Docket for 02-1632

(15)

No. 02-1632 Status: ARGUED
Title: Ralph Howard Blakely, Jr., Petitioner
v.
Washington
Docketed: May 9, 2003
Lower Ct: Court of Appeals of Washington, Division 3
Case Nos.: (19545-7-III)
Decision Date: May 23, 2002
Discretionary Court
Decision Date: February 4, 2003
Questions Presented

| ~~Date~~ | ~~~~~~~~Proceedings and Orders~~~~~~~~

Feb 23 2004	Record received from the Superior Court of Grant County. (1 envelope) (portion of record sealed)
Feb 25 2004	Reply of petitioner Ralph Howard Blakely, Jr. filed. (Distributed)
Mar 23 2004	Argued. For petitioner: Jeffrey L. Fisher, Seattle, Wash. For respondent: John D. Knodell, Jr., Grant County Prosecuting Attorney, Ephrata, Wash.; and on behalf of the United States, as amicus curiae, Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D.C.

Supreme Court, U.S.
FILED

021632 MAY 5 2003

OFFICE OF THE CLERK

No. 02-

IN THE
Supreme Court of the United States

RALPH HOWARD BLAKELY, JR.
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

On Petition for a Writ of Certiorari
to the Washington Court of Appeals, Division III

PETITION FOR A WRIT OF CERTIORARI

BRUCE E. H. JOHNSON
(Counsel of Record)
JEFFREY L. FISHER
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150

QUESTION PRESENTED

Whether a fact (other than a prior conviction) necessary for an upward departure from a *statutory* standard sentencing range must be proved according to the procedures mandated by *Apprendi v. New Jersey,* 530 U.S. 466 (2000).

TABLE OF CONTENTS

QUESTION PRESENTED i

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

A. This Court Should Resolve the Split of Authority Over Whether a Fact (Other Than a Prior Conviction) Necessary For an Upward Departure From a *Statutory* Standard Sentencing Range Must Be Proved According to the Procedures Mandated by *Apprendi*. 7

1. The States' Highest Courts Are Divided Over This Issue. 7

2. The Decision Below Contravenes This Court's Precedent. 11

B. The Question Presented Is of Great Importance 15

C. This Case Is an Excellent Vehicle for Considering the Question Presented. 17

CONCLUSION 19

APPENDIX A, Washington Court of Appeals Opinion 1a

APPENDIX B, Superior Court's Findings of Fact & Conclusions of Law Re: Exceptional Sentence 24a

APPENDIX C, Superior Court's Judgment and Sentence 35a

APPENDIX D, Washington Supreme Court Order Denying Review 42a

APPENDIX E, Superior Court's Sentencing Hearing 43a

APPENDIX F, Relevant Provisions of the Revised Code of Washington 51a

APPENDIX G, Petition for Review by the Washington Supreme Court 69a

TABLE OF AUTHORITIES

Cases:

Apprendi v. New Jersey, 530 U.S. 466 (2000) ..... passim

Ashby v. State, 2002 WL 977444 (Minn. App. 2002) 9

Jackson v. State, 2002 WL 31835460 (Minn. App. 2002) 9

Jones v. United States, 526 U.S. 227 (1999) 12-13

McMillan v. Pennsylvania, 477 U.S. 79 (1986) 14, 15

Mistretta v. United States, 488 U.S. 361 (1989) 17

People v. Riley, 2003 WL 1795549 (Mich. App. Apr. 3, 2003) 16

People v. Rivera, 62 P.3d 1056 (Colo. App. 2002) 16

Ring v. Arizona, 536 U.S. 584 (2002) 11, 13, 14

State v. Cullen, 60 P.3d 933 (Kan. 2003) 10

State v. Dilts, 39 P.3d 276 (Or. App. 2002), *appeal allowed*, 57 P.3d 581 (Or. 2002) 9

State v. Gore, 143 Wn.2d 288, 21 P.3d 262 (2001) ..... passim

State v. Gould, 23 P.3d 801 (Kan. 2001) 9, 10, 16

State v. Urlacher, 111 Wn. App. 1020 (2002), *review denied*, 60 P.3d 92 (Dec. 4, 2002) 8

Willis v. State, 57 P.3d 688 (Ak. App. 2002) 16

Statutes:

28 U.S.C. § 1257(a) 1

Kan. Stat. Ann. §21-4716(b) 9

Kan. Stat. Ann. § 21-4716(a) 9

Wash. Rev. Code § 9 12

Wash. Rev. Code §9.94A.589 4

Wash. Rev. Code § 9.94A.010 2

Wash. Rev. Code § 9.94A.120(1) 8, 9, 11

Wash. Rev. Code § 9.94A.120(2) 8, 9, 11

Wash. Rev. Code § 9.94A.120(14) 13

Wash. Rev. Code § 9.94A.120(14) 9

Wash Rev. Code § 9.94A.120(2), (3) 11

Wash. Rev. Code § 9.94A.120.390(2) 9

Wash. Rev. Code §§ 9.94A.310 & 370 9

Wash. Rev. Code § 9.94A.370(2) 7

Wash. Rev. Code §§ 9.94A.505(11) 4

Rev. Code. Wash. §§ 9.94A.505-35 2

Wash. Rev. Code § 9A.20.021 .....9, 13

Wash Rev. Code § 9A.20.021(b) 8

Wash. Rev. Code § 10.99.020(3) 4

Wash. Rev. Code § 10.99.040 4

Other Authorities:

Christina N. Davilas, *Prosecutorial Sentence Appeals: Reviving the Forgotten Doctrine in State Law as an Alternative to Mandatory Sentencing Laws*, 87 Cornell L. Rev. 1259 (2002) 15, 16

Michael Tonry, *Intermediate Sanctions in Sentencing Guidelines*, 23 Crime & Just. 199 (1998) 16

Richard Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 St. Louis U. L.J. 425 (2000) 16

PETITION FOR A WRIT OF CERTIORARI

Ralph Howard Blakely, Jr.[1] petitions for a writ of certiorari to the Washington Court of Appeals, Division III, in *State v. Blakely*, No. 19545-7-III.

OPINIONS BELOW

The opinion of the Washington Court of Appeals is reported at 111 Wn. App. 851, 47 P.3d 149 (2002), and is reprinted at App. 1a-23a. The order of the Washington Supreme Court denying discretionary review of that decision is published at 62 P.3d 889 (2003), and is reproduced at App. 42a. The trial court's sentencing orders are unpublished and are reproduced at 24a-41a.

STATEMENT OF JURISDICTION

The Washington Supreme Court issued its order denying Petitioner's petition for review on February 4, 2003 App. 42a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

---

[1] Some of the captions of the opinions below incorrectly transpose Mr. Blakely's first and middle names. His true name is Ralph Howard Blakely, Jr.

Relevant statutory provisions of the Revised Code of Washington are reproduced at App. 51a-68a.

STATEMENT OF THE CASE

1. The Washington Legislature enacted the Sentencing Reform Act of 1981 (the "Sentencing Reform Act" or the "Act") to "develop[] a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences." Wash. Rev. Code § 9.94A.010. The core of this Act is a grid of "standard ranges," or "presumptive sentences," calculated according to the seriousness of the offense and the criminal history of the offender. *See* § 9.94A.310.[2] (The relevant portions of the Sentencing Reform Act are reproduced at App. 51a-64a).

The Act provides, subject to exceptions not relevant here, that when a person is convicted of a felony, courts "shall impose" a sentence within the standard range unless "it finds . . . substantial and compelling reasons justifying an exceptional sentence." §§ 9.94A.120(1)-(2). The Act then sets forth factors, such as manifesting deliberate cruelty and knowingly inflicting violence upon a pregnant victim, §§ 9.94A.390(2)(a) & (c) that may supply a substantial and compelling reason to depart upward and impose an exceptional sentence. Although these enumerated factors are "illustrative" rather than exclusive, § 9.94A.390, "[a] reason offered to justify an exceptional sentence can be considered *only if* it takes into account factors *other than those which are used in computing the standard range sentence for the offense*." *State v. Gore*, 143 Wn.2d 288, 315-16, 21 P.3d 262 (2001) (emphasis added).

---

[2] The Washington Legislature has recodified and amended various provisions of the Sentencing Reform Act since the trial court proceedings in this case. *See* Rev. Code. Wash. §§ 9.94A.505-35 (2002). None of these changes alter the substantive Washington law relevant to this case in any relevant respect. For purposes of simplicity, this petition refers, as the courts below did, to the old statutory section numbers.

In other words, a court may depart upward from the standard sentencing range only by making findings beyond those required by the elements of the underlying offense. Such findings need be made only "by a preponderance of the evidence." § 9.94A.370(2); *Gore*, 143 Wn.2d at 315.

The Act also caps the extent to which Washington courts may depart upward from standard ranges. "A court may not impose a sentence providing for a term of confinement . . . which exceeds the statutory maximum for the crime as provided in [§ 9A.20.121]." § 9.94A.120(14). The "statutory maximum," as defined in § 9A.20.121, sets maximum sentences depending on whether the offense of conviction is a class A felony (life), class B felony (ten years), or class C felony (five years).

2. Petitioner Ralph Howard Blakely, Jr. "has been diagnosed at various times since 1972 as suffering from schizophrenia." App. 4a; *see also* App. 31a-32a. He and his wife, Yolanda, separated in 1995, and later that year she filed for divorce. Over the next two years, Yolanda sought to terminate the family trust and to remove Petitioner's control over certain jointly held properties. App. 24a. In 1998, according to factual findings by the trial court, Petitioner, while armed with a knife, abducted his wife from their home in Washington and drove her toward another of the family's properties in Montana. During parts of the drive Petitioner forced his wife to ride in a wooden box in the bed of his pick-up truck; at other times she rode in the passenger seat. Petitioner told her during these actions that he was doing this because wanted her to dismiss the divorce filing and the litigation over the trust. App. 25a-26a.

On July 18, 2000, Petitioner entered an *Alford* plea of guilty in the Superior Court of Washington for Grant County to one count of second degree kidnapping with a deadly weapon and to one count of second degree assault, both of which are

class B felonies. App. 1a, 35a-36a.[3] As part of the plea agreement, the State agreed to recommend a sentence in the high end of the standard range. App. 6a. The standard range for the kidnapping charge was 49 to 53 months,[4] and the standard range for the assault charge was 12 to 14 months. App. 6a. Under Washington law, such sentences presumptively run concurrently. *See* Wash. Rev. Code §9.94A.589.

Before imposing a sentence, the trial court asked Petitioner's wife to describe the circumstances underlying the crimes. The court also reviewed three psychological evaluations stating that Petitioner had abducted his wife as an "honest attempt" – misguided though it was – "to renew his family." App. 44a; *see also* App. 32a. After hearing these presentations, the court noted that "[t]here has always been, in this case, a great deal of dispute about such things as [Petitioner's] mental condition at the time that these offenses occurred [and Petitioner's] motivation for doing what he did." App. 46a.

At the close of the sentencing hearing, the court rejected the recommended sentence as "too lenient," App. 47a, and stated that it intended to depart upward 37 months from the top of the standard range and impose an exceptional sentence

[3] Mr. Blakely's guilty plea also acknowledged that his crimes involved domestic violence because his wife was the victim. App. 35a; Wash. Rev. Code § 10.99.020(3)(b) & (p) (requiring trial courts to make a finding of "domestic violence" when the victim of a kidnapping or assault was a member of the defendant's family). A "domestic violence" plea does not affect the length of offender's sentence but rather allows the court to issue certain kinds of directives such as "no contact" orders and orders requiring the offender to participate in a domestic violence perpetrator program. *See* Wash. Rev. Code §§ 9.94A.505(11) & 10.99.040; App. 39a (issuing no contact order here).

[4] Petitioner's standard range for the kidnapping charge included an enhancement for the use of a deadly weapon. Deadly weapon enhancements in Washington must be plead in the indictment and proved beyond a reasonable doubt. Petitioner's guilty plea encompassed this issue.

of 90 months. The court stated that this upward departure would be based on findings of (i) deliberate cruelty, which is a statutorily enumerated aggravating factor, § 9.94A.390(2)(a), and (ii) "domestic violence plus deliberate cruelty and commission within the sight or sound of the victim's minor child," which likewise is enumerated at § 9.94A.390(2)(h)(ii) & (iii). App. 15a; *see also* 47a-50a (judge's oral explanation). In response, Petitioner moved to withdraw his guilty plea, but the court denied that motion.

Petitioner also objected to the court's intended sentence. The court then continued the sentencing hearing and decided to hold an evidentiary hearing regarding whether to depart upward from the standard range. Before that hearing, Petitioner filed a motion requesting a standard range sentence and arguing that *Apprendi v. New Jersey,* 530 U.S. 466 (2000), prohibited the court from departing upward without submitting the factual bases for the proposed aggravators to a jury and requiring that these facts be proved beyond a reasonable doubt. App. 12a. The court rejected the *Apprendi* argument and went ahead with the evidentiary bench hearing.

Following the hearing, the trial court entered an order finding as a matter of fact that Petitioner's "motivation to commit the kidnapping was complex, contributed to by his mental condition and personality disorders, the pressures of divorce litigation, the impending trust litigation trial and anger over his troubled interpersonal relationships with his spouse and children." App. 32a. The court also found that Petitioner's "capacity to appreciate the wrongfulness of his conduct . . . was impaired by his personality disorders, but not significantly so." App. 33a. Turning then to the statutory aggravating factors, the court concluded that Petitioner's "personality disorders did not significantly impair his capacity to act with deliberate cruelty." Accordingly, the court imposed the 90-month exceptional sentence, to run concurrently with a 14-month sentence for the assault charge. App. 7a, 33a-34a.

3. The Washington Court of Appeals affirmed Petitioner's conviction and sentence. Addressing the upward departure that the trial court imposed, the Court of Appeals noted that a technicality in state law may have prevented the trial court from relying on bare "deliberate cruelty" as an aggravating factor. App. 17a. But it ruled that this potential error was irrelevant because "the alternate basis of domestic violence with deliberate cruelty supports the exceptional sentence here." App. 17a n.4.

The court then rejected Petitioner's *Apprendi* argument. The Court of Appeals noted the Washington Supreme Court had held in *State v. Gore,* 143 Wn.2d 288 (2001), that "*Apprendi* does not apply to factual determinations that support reasons for exceptional sentences upward." App. 18a. The *Gore* decision, therefore, foreclosed Petitioner's contention.

4. Petitioner sought discretionary review of this decision in the Washington Supreme Court, arguing, *inter alia*, that the trial court's upward departure contravened *Apprendi*. App. 69a-70a. The Washington Supreme Court denied review without comment. App. 42a.

REASONS FOR GRANTING THE WRIT

Ten of the seventeen states that have sentencing guidelines codify standard, or presumptive, sentencing ranges. Under these systems, sentencing courts may impose sentences above the statutory standard ranges *only if* they find, by a preponderance of the evidence, aggravating facts that are not already encompassed within the elements of the underlying offense. Courts within these ten states are in conflict concerning whether such factual findings must be made according to the procedures mandated by *Apprendi v. New Jersey,* 530 U.S. 466 (2000).

This case presents an ideal vehicle for resolving this important issue. The trial court here imposed an upward departure based on a factual determination – that defendant acted with "deliberate cruelty" in the course of committing domestic violence – that it acknowledged involved a "complex" *mens rea* issue that was the subject of "a great deal of dispute" at an evidentiary hearing. App. 32a, 46a. This Court should grant certiorari and hold that *Apprendi* requires factual issues under these circumstances to be submitted to a jury and proved beyond a reasonable doubt.

A. This Court Should Resolve the Split of Authority Over Whether a Fact (Other Than a Prior Conviction) Necessary For an Upward Departure From a *Statutory* Standard Sentencing Range Must Be Proved According to the Procedures Mandated by *Apprendi.*

1. The States' Highest Courts Are Divided Over This Issue.

Washington's "sentencing guidelines," in contrast to the federal guidelines, are a statutory enactment, known as the Sentencing Reform Act. Sections 9.94A.120(1) and (2) of that Act require courts to impose sentences within a statutory standard range unless they determine "aggravating facts" to be present "other than those which are used in computing the standard range sentence for the offense." *State v. Gore,* 143 Wn.2d 288, 315-16 (2001). A court, rather than a jury, may find such facts, and they need be found only by a preponderance of the evidence, instead of beyond a reasonable doubt. *Id.* at 315; Wash. Rev. Code § 9.94A.370(2).

The Washington Supreme Court held in *State v. Gore,* that the Sentencing Reform Act's procedures for departing upward from the statutory standard range do not contravene

this Court's decision in *Apprendi v. New Jersey,* 530 U.S. 466 (2000), because, under the Act, "the sentencing judge cannot impose *an exceptional sentence* greater than" the maximum provided in another provision of Washington law. 143 Wn.2d at 313-14 (emphasis added). In other words, the Washington Supreme Court ruled that upward departures under Washington's sentencing guidelines are not subject to *Apprendi* because even though Wash. Rev. Code §§ 9.94A.120(1) & (2) prohibit courts from imposing a sentence above the top of standard range unless they find an aggravating fact to be present, the extent to which a sentencing judge may depart upward, upon finding such a fact, also is capped.

The trial court in this case followed the procedures of the Sentencing Reform Act in sentencing Petitioner. The top of Petitioner's statutory standard range was 53 months, and the limit for an upward departure was 120 months. App. 18a; Wash Rev. Code § 9A.20.021(b). Over Petitioner's *Apprendi* objection, the court found that an aggravating fact – deliberate cruelty in the course of domestic violence – was present and imposed an exceptional sentence upward of 90 months. The Washington Court of Appeals then held that it was bound by the *Gore* decision to reject Petitioner's *Apprendi* argument because "*Gore* held that Washington's statutory scheme permits a judge to impose an exceptional sentence within the maximum range determined by the Legislature." App. 18a. "Consequently," the court continued, "the facts supporting the exceptional sentence here did not have to be submitted to a jury or proved beyond a reasonable doubt." App. 19a. The Washington Supreme Court denied review of this decision, App. 42a, presumably because it was a straightforward application of *Gore. See also State v. Urlacher,* 111 Wn. App. 1020, *review denied,* 60 P.3d 92 (Wash. Dec. 4, 2002) (same).

Three other state courts whose states have guideline sentencing systems that in all relevant respects are identical to Washington's have confronted the same *Apprendi* argument

that the *Gore* opinion and the decisions below rejected. Two of those courts reached the same conclusion as the Washington courts and upheld the sentencing procedures at issue. *See State v. Dilts,* 39 P.3d 276, 278-84 (Or. App. 2002), *review allowed,* 57 P.3d 581 (Or. 2002); *Ashby v. State,* 2002 WL 977444, at *1-3 (Minn. App. 2002); *Jackson v. State,* 2002 WL 31835460, at *5 (Minn. App. 2002), *review granted* (Feb. 18, 2003) (on post-conviction review).

The Kansas Supreme Court, however reached the opposite result in *State v. Gould,* 23 P.3d 801 (Kan. 2001), with regard to the Kansas sentencing guidelines. Kansas law, like Wash. Rev. Code §§ 9.94A.310 & 370, has a sentencing grid that sets forth "presumptive felony sentences." *Gould,* 23 P.2d at 811. Kansas law also provides, just like Wash. Rev. Code §§ 9.94A.120(1) & (2), that "[t]he sentencing judge shall impose the presumptive sentence provided by the sentencing guidelines . . . , unless the judge finds substantial and compelling reasons to impose a departure." *Gould,* 23 P.2d at 812 (quoting Kan. Stat. Ann. § 21-4716(a)). Kansas law, just like Wash. Rev. Code § 9.94A.120.390(2), further supplies a "nonexclusive list of aggravating factors [that] may be considered in determining whether substantial and compelling reasons for [a] departure exist." *Gould,* 23 P.2d at 812 (quoting Kan. Stat. Ann. §21-4716(b)). These factors may support an upward departure only when they are not already encompassed in the elements of the offense of conviction. And Kansas law, just like Wash. Rev. Code §§ 9.94A.120(14) & 9A.20.021, has an additional statute that sets a second "statutory maximum," *i.e.,* that limits the extent to which a sentencing court may depart upward from the presumptive range. *Gould,* 23 P.3d at 806 (noting defendant's "maximum total sentence").

But unlike the Washington Supreme Court in *Gore* and the Court of Appeals in this case, the Kansas Supreme Court held in *Gould* that its law permitting judges to find aggravating

facts by a preponderance of the evidence "directly contravene[d]" *Apprendi* and, hence, was unconstitutional. 23 P.3d at 814. The defendant in *Gould* faced a statutory standard range of 31 to 34 months per count and a limit for upward departures of 68 months per count. The State argued, echoing the *Gore* decision, "that the presumed sentence was not the maximum sentence allowed by law" as *Apprendi* used that term because of the extent to which a court could depart upward also was capped. But the Court rejected this argument, explaining that:

> Under *Apprendi,* it does not matter how the required finding is labeled, but whether it exposes the defendant to a greater punishment than *authorized by the jury verdict. See* 530 U.S. at 469. Gould's jury verdict "authorized" a sentence of 31 to 34 months for each child abuse conviction. By imposing two 68-month sentences, the district court went beyond the maximum sentence *in the applicable grid box* and exposed Gould to punishment greater than that authorized by the jury verdict.

23 P.3d at 812-13 (emphasis added). In subsequent cases, the Kansas Supreme Court has made it clear that this same reasoning applies when, as here, the defendant pleads guilty to the underlying offense and receives an exceptional sentence upward. *See, e.g., State v. Cullen,* 60 P.3d 933, 935-37 (Kan. 2003).

These holdings of the Kansas Supreme Court are in direct conflict with the Washington Supreme Court's decision in *Gore* and the Washington Court of Appeals' application of *Gore* in this case, as well as the decisions of the Oregon and Minnesota Courts of Appeals. This conflict has existed for nearly two years now, and it cannot be resolved without this Court's intervention.

2. The Decision Below Contravenes This Court's Precedent.

A careful application of this Court's precedent dictates that upward departures from a statutory standard sentencing range, such as the Washington range at issue here, should be subject to *Apprendi*. In *Apprendi,* this Court held that any fact that subjects a defendant to a longer sentence than that "prescribed by the legislature," or the "statutory limit[]," must be submitted to a jury and proved beyond a reasonable doubt. 530 U.S. at 481-82; *see also id.* at 490 ("prescribed statutory maximum"). *Apprendi*, alternately stated, applies to any fact that, "if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone" (or the guilty plea alone). *Id.* at 483[5]; *accord Ring v. Arizona,* 536 U.S. 584, 588-89 (2002) (reaffirming this test).

Wash. Rev. Code §§ 9.94A.120(1) & (2) direct sentencing courts to "impose a sentence within the sentence range for the offense" unless aggravating or mitigating facts not accounted for in the elements of the offense of conviction are present. Under Washington statutory law, therefore, Petitioner's guilty plea subjected him to a sentencing range of 49-53 months – a legislatively prescribed statutory maximum of 53 months. App. 6[illegible]15a. Petitioner's sentencing court, in the words of the Washington Supreme Court, could impose a sentence outside of this statutory range

> *only* [if it found] substantial and compelling reasons, set forth in written findings and conclusions, which support an exceptional sentence. Wash Rev. Code § 9.94A.120(2), (3) . . . . A reason offered to justify an

[5] The defendant in *Apprendi,* like Petitioner here, pled guilty to the underlying offense. *See* 530 U.S. at 469-70.

> exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense.

Gore, 143 Wn.2d at 315-16 (emphasis added); *see also* App. 15a (same rule).

This is exactly what Petitioner's sentencing court did. It determined that an aggravating factor – deliberate cruelty with domestic violence, App. 17 n.4 – that is not an element of Petitioner's offense of conviction was present in this case. Based on that factual finding, the court imposed, and the Court of Appeals affirmed, the imposition of a sentence 37 months longer than the maximum that could be imposed for Petitioner's guilty plea to the elements of second degree kidnapping with a deadly weapon. App. 7a, 19a.

This procedure constitutes a paradigmatic *Apprendi* violation. The court – rather than a jury – found certain facts by a preponderance – rather than beyond a reasonable doubt – that exposed Petitioner to a sentence exceeding that prescribed by the legislature for the bare offense to which he pled guilty. *Apprendi* itself, in fact, noted that increasing a sentence based on a "second *mens rea* requirement" without submitting the issue to a jury is a classic violation because "[t]he defendant's intent in committing a crime is perhaps as close as one might come to a core criminal offense 'element.'" 530 U.S. at 493. The trial court's finding that Petitioner committed "domestic violence plus deliberate cruelty and commission within the sight or sound of the victim's minor child," App. 15a (citing § 9.94A.390(2)(h)(ii) & (iii)), found a second *mens rea* fact (deliberate cruelty) that is not required for a violation of the second degree kidnapping statute. *See* Wash. Rev. Code § 9A.40.030 (kidnapping statute). It also found an additional *actus reus* fact (domestic violence in the presence of a child) that is not encompassed in that statute. *Compare Jones v.*

United States, 526 U.S. 227 (1999) (fact such as inflicting serious bodily injury that increases maximum sentence must be treated as element of offense).

Neither of the two reasons that the Washington Supreme Court advanced in *Gore* to uphold this upward departure procedure withstands scrutiny. First, the Court noted that Wash. Rev. Code § 9A.20.021 sets forth "maximum sentences" for the various classes of felonies, and that Wash. Rev. Code § 9.94A.120(14) prohibits courts from imposing an exceptional sentence "which exceeds the statutory maximum." *Gore,* 143 Wn.2d at 313-14. Ergo, according to the Court, exceptional sentences in Washington do not violate *Apprendi* because they do not "increase the maximum sentence." *Id.* at 314.

But this argument ignores this Court's admonition in *Apprendi*, which it reiterated in *Ring*, that "[t]he dispositive question . . . 'is one not of form, but of effect.' If a State makes an increase in a defendant's authorized punishment contingent on the finding of fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Ring,* 536 U.S. at 602 (quoting *Apprendi,* 530 U.S. at 494). This means that Washington cannot avoid the man-dates of *Apprendi* simply by labeling the maximum increase for an *upward departure* the "statutory maximum." The critical question under *Apprendi* is what the maximum penalty is "if punished *according to the facts reflected in the jury verdict alone*." *Apprendi,* 530 U.S. at 483 (emphasis added); *accord Ring,* 536 U.S. at 597. That penalty in Washington is indisputably the upper end of the standard range. The fact that an additional statute caps the extent to which a court may depart upward from that range is irrelevant.

Indeed, this Court in *Ring* found an *Apprendi* violation regarding an Arizona procedure that is in all relevant respects the same as Washington's. The Arizona first-degree felony

murder statute "authorizes a maximum penalty of death . . . in a formal sense" because it notes that death is the maximum sentence available for that crime. 536 U.S. at 604 (quotation omitted); *see also id.* at 592. But "[b]ased solely on the jury's verdict finding [a defendant] guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment. [citations omitted]. This was so because, in Arizona, a death sentence may not legally be imposed . . . unless at least one aggravating factor is found to exist." *Id.* at 597 (quoting *State v. Ring*, 25 P.3d 1139, 1151 (Ariz. 2001)). This Court thus held that the procedures for finding such an aggravating factor were subject to *Apprendi* because otherwise, "*Apprendi* would be reduced to a 'meaningless and formalistic' rule of statutory drafting." *Id.* at 604.[6]

Precisely the same analysis applies here. Because Washington courts may not legally impose an upward departure from the range prescribed by a guilty verdict or plea alone "unless at least one aggravating factor is found to exist," *id.*, the procedures for finding such a factor must comply with *Apprendi*.

Second, the Washington Supreme Court stated that factual determinations underlying exceptional sentences upward are more like the determination at issue in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), than those covered by

---

[6] Justice Thomas utilized similar reasoning in *Apprendi* itself in explaining the application of that case's rule: "[A] 'crime' includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). Thus, if a legislature defines some core crime and then provides for increasing the punishment of that crime *upon a finding of some aggravating fact* – of whatever sort . . . – the core crime and the aggravating factor together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime" and must be submitted to the jury and proved beyond a reasonable doubt. 530 U.S. at 501 (Thomas, J., concurring) (emphasis added).

Apprendi. *Gore*, 143 Wn.2d at 314. But *McMillan* applies only to facts necessary to impose a certain *minimum* sentence. And this Court in *Apprendi* expressly "limit[ed] [*McMillan*'s] holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury verdict – a limitation identified in the *McMillan* opinion itself." 530 U.S. at 487 n.13. The aggravating facts at issue here – as in all upward departures in Washington – do not dictate any minimum sentence. Rather, they allow the "imposition of a sentence more severe than the statutory maximum for the offense established by the jury verdict." *Apprendi*, 530 U.S. at 487 n.13. As such, they are covered by *Apprendi*, not *McMillan*.

B. The Question Presented Is of Great Importance.

The question whether *Apprendi* applies to factual findings necessary to impose upward departures from statutory standard sentencing ranges is one of great importance to the administration of criminal justice in numerous states. In *Apprendi* itself, this Court stated that the constitutional protections against judges increasing sentences based on facts not proved beyond a reasonable doubt are "of surpassing importance." 530 U.S. at 476. The application of these protections to upward departures from statutory standard sentencing ranges is of even more consequence here than it was in *Apprendi*.

Ten states, including Washington, of the seventeen that have sentencing guidelines codify presumptive sentencing ranges from which sentencing courts may depart only upon finding aggravating facts not accounted for in the standard range. Justin Austin, *Sentencing Guidelines, A State Perspective*, No. 235 Nat. Inst. Just. J. 25, 25 (1998); Christina N. Davilas, *Prosecutorial Sentence Appeals: Reviving the Forgotten Doctrine in State Law as an Alternative to*

Mandatory Sentencing Laws, 87 Cornell L. Rev. 1259, 1274 & n.101 (2002).[7] Because the thousands of courts in these states sentence criminal defendants on practically a daily basis, the uncertainty regarding what procedures the Constitution requires for them to impose upward departures poses a recurring problem. Furthermore, it appears that at least eight other states are actively considering adopting some form of guidelines system. Richard Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines,* 44 St. Louis U. L.J. 425, 427, 446 (2000). These states should have the benefit of this Court's immediate guidance regarding the permissibility of adopting upward departure systems such as the one at issue here.[8]

It is worth making clear, however, that a decision from this Court prohibiting upward departure systems such as

---

[7] In addition to Washington, those states are Alaska, Kansas, Michigan, Minnesota, North Carolina, Ohio, Oregon, Pennsylvania, and Tennessee. Michael Tonry, *Intermediate Sanctions in Sentencing Guidelines,* 23 Crime & Just. 199, 200-01 (1998) (listing eight of the states); *People v. Riley,* 2003 WL 1795549 (Mich. App. Apr. 3, 2003); *Willis v. State,* 57 P.3d 688, 697-98 (Ak. App. 2002). Seven other states have guideline systems that provide sentencing ranges that function merely "as suggestions that the judge may look to for guidance, but which are nonbinding." Davilas, 87 Cornell L. Rev. at 1274 n.101; *see also* Richard S. Frase, *Is Guided Discretion Sufficient?,* 44 St. Louis U. L.J. 425, 428, 446 (2000) (describing these "voluntary" guideline systems and charting different states' regimes). As such, these states' guidelines are not implicated in this case.

[8] Resolution of the question presented may also affect sentencing systems in other states that do not have, and are not considering, the type guidelines at issue here. Some states that lack "guidelines" nevertheless have broader statutory "presumptive sentencing ranges" from which courts may depart upward based only upon the finding of aggravating circumstances. *See e.g., People v. Rivera,* 62 P.3d 1056 (Colo. App. 2002) (rejecting an *Apprendi* challenge to this type of system and noting that "[t]o the extent that [*State v.*] *Gould* [23 P.3d 801 (Kan. 2001)] can be read to favor a result contrary to that reached here, we decline to follow it").

Washington's would not invalidate the federal sentencing guidelines, or even states' sentencing guidelines. The federal sentencing guidelines, unlike Washington's and other states' guidelines, are not legislative acts. The federal guidelines are promulgated by a Sentencing Commission that resides in the Judicial Branch and that is comprised in part of federal judges. Accordingly, as this Court noted in *Mistretta v. United States,* 488 U.S. 361 (1989), presumptive sentencing ranges under the federal guidelines are "court rules" derived from "judicial rulemaking," *id.* at 386 & 391, not legislative acts. Only the latter trigger *Apprendi*'s "statutory" maximum rule. 530 U.S. at 482; *see also id.* at 481 (judges' sentencing discretion is "bound by the range of sentencing options *prescribed by the legislature*") (emphasis added).

Even states whose legislatures have enacted guidelines with statutory standard sentencing ranges could avoid the constitutional infirmity present here simply by providing that facts supporting upward departures must be submitted to a jury and proved beyond a reasonable doubt (or included in any guilty plea). The remainder of these states' guideline systems are wholly unaffected by the question presented here.

C. This Case Is an Excellent Vehicle for Considering the Question Presented.

Three aspects of this case render it an excellent vehicle for resolving the split of authority concerning whether a fact (other than a prior conviction) necessary for an upward departure from a statutory standard sentencing range must be proved according to the procedures mandated by *Apprendi.* First, this case is on direct review, and Petitioner unambiguously raised the federal constitutional issue presented in a motion before he was sentenced and at each appellate level of the Washington courts. App. 12a, 18a, 69a-70a. Consequently, there is not any retroactivity or other procedural impediment to this Court's considering this issue.

Second, there is every reason to believe that the *Apprendi* violation here was not harmless. The trial court elevated Petitioner's sentence based in part on its finding that his offense manifested deliberate cruelty. App. 17a n.4 & 33a. Yet the trial court acknowledged that this was a "complex" *mens rea* issue here because "[t]here has always been, in this case, a great deal of dispute about such things as [Petitioner's] mental condition at the time that these offenses occurred [and Petitioner's] motivation for doing what he did." App. 32a, 46a. After an evidentiary hearing, it resolved that issue by finding that "[d]efendant's personality disorders did not *significantly* impair his capacity to act with deliberate cruelty." App. 33a (emphasis added). Under these circumstances, a jury forced to find beyond a reasonable doubt that the defendant acted with deliberate cruelty would have been hard pressed to do so.

Third, this case also implicates *Apprendi*'s core concern that the defendant have the "ability to predict with certainty the judgment from the face of the felony indictment" or the four corners of his guilty plea. 530 U.S. at 478. Under the facts encompassed in Petitioner's guilty plea, the maximum sentence he could receive was 53 months. But the trial court, without the consent of the defendant or even the State, imposed a sentence that was 37 months longer than this statutory limit, based on additional facts that Petitioner hotly disputed. When Petitioner learned of this increased sentence, he moved to withdraw his plea. But the trial court, again, ruled against him. App. 7a.

The central thrust of *Apprendi* is that a defendant should have the right to contest before a jury any fact necessary to increase his sentence above an otherwise applicable statutory limit. And the State should have to prove such a fact beyond a reasonable doubt. This Court should grant certiorari to resolve the conflict of authority regarding the upward departure system at issue here and to prevent defendants such as Petitioner from

being blindsided by court-imposed sentences longer than they could have predicted from their indictments or guilty pleas.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

BRUCE E. H. JOHNSON
(Counsel of Record)
JEFFREY L. FISHER
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150

May 5, 2003

Attorneys for Petitioner

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	No. 19545-7-III
	)	
Respondent	)	
	)	Division Three
v.	)	Panel Six
	)	
HOWARD RALPH BLAKELY,	)	PUBLISHED OPINION
	)	
Appellant.	)	Filed May 23, 2002

SCHULTHEIS, J. -- Howard Ralph Blakely pleaded guilty to one count of second degree kidnapping and one count of second degree assault. Consistent with the plea agreement, the State recommended the high end of the standard range. After a sentencing evidentiary hearing, where the State presented testimony from the victims and mental health professionals, the trial court imposed an exceptional sentence upward. Mr. Blakely now appeals, contending the State violated the plea agreement by advocating for an exceptional sentence. He also challenges the constitutionality of the sentence and the sentencing hearing. Pro se, he claims he had ineffective assistance of counsel and alleges various acts of misconduct by the State. Finding no error, we affirm.

FACTS

Mr. Blakely and Yolanda Blakely were married in 1973. They raised three children: two daughters and their youngest son, Ralphy. The family acquired considerable real property during the marriage, including a home, ranch, and development property in Montana; a home and orchard in Grant County; a lake home; and rental properties. In order to

protect this property from creditors and tax liability, they created a trust known as the Blakely Farms Trust.

In 1995, Ms. Blakely moved to Spokane from Montana, filed for divorce, and obtained a restraining order against Mr. Blakely. One year later, the trustee for the Blakely Farms Trust filed a petition for a declaration of the validity of the trust and for an accounting. In December 1997, the Spokane divorce court authorized Ms. Blakely to move into the Grant County home and to operate the orchard. Her son Ralphy joined her there in June 1998.

On the afternoon of October 26, 1998, about two weeks before the trust litigation was set to begin, Mr. Blakely surprised Ms. Blakely as she walked back from her mailbox. He pushed her to the ground, wrapped duct tape around her mouth and head, and taped her wrists together. Apparently very angry, he told Ms. Blakely he wanted her to dismiss the dissolution and trust proceedings. Noting that O.J. Simpson had gotten away with what he did, Mr. Blakely warned his wife to cooperate or he would kill her and Ralphy. He told her he had many guns, ammunition, and several knives. He then forced her to climb into his pickup canopy, where he locked her in a coffin-like plywood box that he had constructed. The box was about the same width and length as Ms. Blakely's body and had air holes drilled into each end. Ms. Blakely heard her husband loading items from the house into the truck. On several occasions, he opened the lid of the box, pressed a knife blade to Ms. Blakely's neck or nose, and demanded to know where various items could be found. As night fell and it became cold, Mr. Blakely put a quilt over his wife in the box.

Ralphy, age 13, arrived home from football practice after dark. His father met him in the driveway, told him his mother was in great danger, and told him not to cause any trouble. They walked to the pickup, where Ralphy heard his

mother yelling from the box. Mr. Blakely ordered Ralphy to drive his mother's car and warned him that if he "tried anything," Mr. Blakely would shoot the box with a shotgun. Clerk's Papers (CP) at 626.

Mr. Blakely drove the pickup out of the orchard and headed east, with Ralphy following in his mother's car. Eventually they stopped at a truck stop on the outskirts of Moses Lake for gas. When Ralphy and his father entered the truck stop to pay, Ralphy shouted, "Call 9-1-1! Help us! He kidnapped us! He has my mom in a box!" CP at 627. Mr. Blakely tried to drag Ralphy to the car, but truckers shouted to him to leave the boy alone.

He released Ralphy, ran to the pickup, and took off. Ralphy jumped on the pickup bumper and tried to release his mother from the box, but was knocked off when Mr. Blakely accelerated. Ralphy was left behind at the truck stop.

During the subsequent trip to Montana, Mr. Blakely removed the tape from his wife's head and let her sit in the front seat so she could tell any police who stopped them that she was accompanying him of her own free will. He was angry because "Ralphy ruined everything!" CP at 627. On occasion, Mr. Blakely forced Ms. Blakely back into the box. In all, she was locked in the box for over four hours.

They eventually arrived at the house of Mary Gillespie, who lived close to their Montana home. Mr. Blakely let his wife enter Ms. Gillespie's house while he called their older daughter and demanded that she stop the divorce and trust litigation. He also called a stockbroker, received stock quotations, and gave the broker sell orders. Meanwhile, Ms. Blakely and Ms. Gillespie surreptitiously planned to call for help. When Mr. Blakely sent Ms. Gillespie on an errand to a nearby house, she called the police. Officers soon arrived and Mr. Blakely sent his wife

out to tell them that she had come to Montana voluntarily. Instead, she reported that she had been kidnapped, and he was arrested without incident.

Mr. Blakely was charged in federal court with two counts of kidnapping. These charges were later dismissed and the State filed two charges of first degree kidnapping, each involving domestic violence, in October 1998. He pleaded not guilty, with a defense of insanity or diminished capacity.

Mr. Blakely has been diagnosed at various times since 1972 as suffering from schizophrenia. The trial court in the Blakely Farms Trust litigation held a hearing in February 1999 to determine whether the court should appoint a guardian ad litem to represent Mr. Blakely's interests in the trust and dissolution actions. Based on his psychiatric history and a psychologist's recent conclusion that Mr. Blakely suffered "clear mental deficiencies," Def.'s Ex. 2, the civil court appointed a guardian ad litem in early March 1999.

Within days, the State in the criminal action obtained an order for an evaluation at Eastern State Hospital of Mr. Blakely's competency. After reviewing Mr. Blakely's 27-year psychiatric history as well as the results of his current examination, evaluators Dr. Vern Cressey and Dr. Timm Fredrickson concluded that he had high average intelligence, had never been a paranoid schizophrenic, and suffered instead from a severe personality disorder with schizotypal and narcissistic components. Noting his multiple legal difficulties over the years, their report also surmised that Mr. Blakely only sought psychiatric treatment when he was "embroiled in legal issues." CP at 70. On the basis of this evaluation, the criminal trial court entered an order of competency in May 1999.

Because defense counsel continued to have difficulty communicating with Mr. Blakely, the trial court ordered another evaluation in September 1999 to determine whether Mr. Blakely could assist counsel and appreciate the import of the criminal proceedings. The report from this round of evaluations stated that Mr. Blakely began the stay at Eastern with "elective mutism" and "struggl[ed] to find something wrong with himself physically." CP at 291. In the opinion of the evaluators, he was well aware of the court proceedings--including the options and consequences of various pleas--and he had the capacity to understand and assist in his own defense. Despite the evaluation results, defense counsel demanded a jury trial on the issue of Mr. Blakely's competency to stand trial. Finding that RCW 10.77.090 authorizes a pretrial jury determination of competency, the trial court granted the motion.[1]

The criminal competency trial was held in April 2000. Mr. Blakely's counsel sought to introduce the trust court's order appointing the guardian ad litem. This order included a finding that Mr. Blakely "is not competent at this time [March 1999] to comprehend with understanding and intelligence the significance of the entire legal proceedings and their effect on and relationship to his best interests." Def.'s Ex. 1, at 2. Although the criminal trial court found that the civil court's order was not really an adjudication of incompetence, it decided to allow admission of the order at the competency hearing. Later, when defense counsel objected to the trial court's refusal to instruct the jury that the civil court's order raised a rebuttable presumption of incompetence, the trial court ruled as a matter of law that the

---

[1] RCW 10.77.090(1) provides that the trial court may order a defendant who is suspected to be incompetent to undergo an evaluation for up to 90 days. After that time, "if the jury or court, as the case may be, finds that the defendant is incompetent, the charges shall be dismissed without prejudice." Former RCW 10.77.090(3) (1989) (relating to defendants charged with felonies).

order appointing the guardian ad litem did not constitute an adjudication of incompetence. The jury found that Mr. Blakely was competent to stand trial on the criminal charges.

Trial was set for July 2000. On July 18, the court conducted a hearing on a plea agreement. The State offered to amend the charges to one count of second degree domestic violence kidnapping with a deadly weapon enhancement (RCW 9A.40.030(l), 10.99.020, former 9.94A.125 (1983)) and one count of second degree domestic violence assault (RCW 9A.36.021(l)(c), 10.99.020). In exchange for the amended charges and a recommendation for a sentence in the high end of the standard range, Mr. Blakely agreed to an *Alford* plea of guilty.[2] Although Mr. Blakely complained that he could not think clearly due to the intolerable conditions in his jail cell, the trial court eventually determined that Mr. Blakely understood the charges and the agreement.

At the sentencing hearing two weeks later, Mr. Blakely attempted to withdraw the guilty plea, claiming he was pressured by his doctors and lawyers. Finding that it was not credible that Mr. Blakely was under duress or was misled, the trial court denied the motion to withdraw. The State then told the court the standard range for the kidnapping charge with the deadly weapon enhancement was 49 to 53 months and recommended the high end of that range to run concurrently with a sentence of 12 to 14 months for the assault. Before pronouncing sentence, the trial court asked for Mr. Blakely's comments and asked Ms. Blakely to describe her ordeal during the kidnapping. During her testimony, defense counsel protested that she was giving new

[2] See *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) (a defendant may plead guilty while disputing the facts alleged by the prosecution).

information without being under oath. In response, the trial court told her to leave out extraneous details. Ultimately, the trial court rejected the State's recommendation for a standard range sentence and imposed an exceptional sentence of 90 months for the kidnapping, citing the aggravating factors of deliberate cruelty and commission of domestic violence in the presence of a minor child.

In August 2000, Mr. Blakely objected to the exceptional sentence and the trial court continued the matter for an evidentiary hearing. The court asked the State to subpoena Ms. Blakely and other witnesses and admitted it should have held a hearing with witnesses under oath and subject to cross-examination before imposing the exceptional sentence. Before the sentencing hearing, Mr. Blakely again moved to withdraw his guilty plea, arguing that the State violated the plea agreement by advocating for an exceptional sentence. The trial court found that the State's sentencing brief did not suggest what the court ought to do, and denied the motion.

At the sentencing hearing held in October 2000, Ms. Blakely, Ralphy, various mental health experts, and a police officer were examined and cross-examined. After hearing a statement from Mr. Blakely, the trial court again imposed an exceptional sentence of 90 months on the kidnapping charge, to run concurrently with a standard sentence of 14 months on the assault charge. Mr. Blakely's motion to vacate the sentence was denied in January 2001 and this appeal followed.

PRESUMPTION OF INCOMPETENCE

Mr. Blakely first challenges the jury instructions given in the competency trial. He contends the trial court erred in refusing to instruct the jury that a defendant is presumed

incompetent to stand trial if there is proof of a mental illness adjudication.

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and properly inform the jury of the applicable law. *State v. Irons*, 101 Wn. App. 544, 549, 4 P.3d 174 (2000). Mr. Blakely argued at the competency trial that the civil court's conclusion that he lacked competence to represent himself in the trust and dissolution proceedings raised a presumption of incompetence to stand trial on the criminal charges.

Although the trial court allowed admission of the civil court's findings, it held as a matter of law that the civil order did not constitute an adjudication of incompetence. On that basis, the trial court declined to instruct the jury that a mental illness adjudication rebutted the presumption of competence. The trial court properly found that neither the evidence nor the law supported Mr. Blakely's proposed instruction.

The test for competency to stand trial is whether the defendant is able to understand the proceedings against him or her and can assist in his or her defense. *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 862, 16 P.3d 610 (2001). A rebuttable presumption of mental incompetency is raised by proof of a mental illness adjudication. *State v. Smith*, 97 Wn.2d 801, 803, 650 P.2d 201 (1982); *State v. Bonner*, 53 Wn.2d 575, 587-88, 335 P.2d 462 (1959). On the other hand, "[i]t is the fact of mental incompetency, and not the adjudication of mental illness, that determines one's inability to form an intent to commit an offense, or his inability, after an offense has been committed, to aid in his defense." *Id.* at 586 (emphasis omitted).

The civil court deciding Mr. Blakely's trust and dissolution cases found that the weight of past and current psychological evaluations supported a finding that Mr. Blakely was not competent to understand the nature and complexity of the trust issues. Consequently, a guardian ad litem was appointed to represent his interests in those cases only. Mr. Blakely was not, however, adjudged to have a mental illness or to be generally incompetent. As the civil court stated in its order appointing the guardian ad litem, "The court's findings and conclusions in this case shall have no precedential or preclusive effect on any other civil or criminal proceeding involving Ralph H. Blakely, Jr. and the matters at issue therein." Def.'s Ex. 1, at 2. Because the civil court's order did not presume to apply beyond the time frame and issues of the trust and dissolution proceedings, it did not constitute an actual adjudication of mental illness. The order served as relevant evidence of Mr. Blakely's ability to understand the criminal proceedings and to assist in his defense, but it did not give rise to a presumption that Mr. Blakely was incompetent. Consequently, the order did not support an instruction declaring that proof of a prior mental illness adjudication raised a presumption of incompetence. *Irons*, 101 Wn. App. at 549. Violation of the Plea Agreement Mr. Blakely's next contention is that the prosecutor violated the plea agreement by advocating for an exceptional sentence upward. He argues that the prosecutor effectively undercut the recommendation of a standard sentence by discussing in the sentencing brief recent decisions on the factual bases for exceptional sentences and by eliciting testimony at the sentencing hearing to support aggravating factors.

A plea bargain is a contract between the criminal defendant and the prosecutor. *State v. Talley*, 134 Wn.2d 176, 182, 949 P.2d 358 (1998); *State v. Sledge*, 133 Wn.2d 828, 838-39 n.6, 947 P.2d 1199 (1997). Due process requires the prosecutor to adhere to the terms of the contract by

recommending the agreed-upon sentence. *Talley*, 134 Wn.2d at 183; *Sledge*, 133 Wn.2d at 839. The prosecutor's conduct at the sentencing hearing must not undercut the plea bargain:

> Although the recommendation need not be made enthusiastically, the prosecutor is obliged to act in good faith, participate in the sentencing proceedings, answer the court's questions candidly in accordance with RPC 3.3 and, consistent with RCW 9.94A.460, not hold back relevant information regarding the plea agreement.[3]

Talley, 134 Wn.2d at 183. Mere participation in an evidentiary hearing convened by the court to determine whether evidence supports an exceptional sentence will not undercut the State's agreed-upon sentence recommendation. *Id.* at 185-86.

Mr. Blakely cites *In re Pers. Restraint of Palodichuk*, 22 Wn. App. 107, 589 P.2d 269 (1978) for the principle that less than wholehearted support for the terms of the plea bargain can constitute a breach. In *Palodichuk*, the prosecutor recommended a suspended sentence and probation, but then told the court he had obtained new

---

[3] RPC 3.3 states:

"(a) A lawyer shall not knowingly:

"(1) Make a false statement of material fact or law to a tribunal."

"A prosecutor, like any other attorney, has a duty of candor toward the tribunal which precludes it from making a false statement of material fact or law to such tribunal." [*State v.*] *Coppin*, 57 Wn. App. [866,] 874 n.4[, 791 P.2d 228 (1990)].

RCW 9.94A.460 states in part:

"The prosecutor shall not agree to withhold relevant information from the court concerning the plea agreement."

information that gave him "second thoughts about that recommendation." *Id.* at 109 (emphasis omitted). The prosecutor's reservations did more than express less than wholehearted support for the terms of the plea bargain, they seriously undercut the agreement. *See Talley*, 134 Wn.2d at 184 (discussing *Palodichuk*).

Similarly, the prosecutor in *Sledge* recommended a standard range sentence for a juvenile offense, but then extensively examined the probation counselor concerning her reasons for recommending an exceptional sentence, presented the testimony of a parole officer who reported problems with the juvenile, and gave a detailed summary of the aggravating factors to the court. The Supreme Court found that the prosecutor's fervor in setting out and emphasizing evidence supporting the aggravating factors undercut the plea bargain. *Sledge*, 133 Wn.2d at 842-43.

As the Supreme Court stated in *Talley*, 134 Wn.2d at 183, the prosecutor need not make the agreed sentencing recommendation enthusiastically, but must not appear to advocate for an exceptional sentence. The State's mere participation in an evidentiary hearing-presenting relevant evidence to the court and responding to its inquiries-will not constitute a breach of the plea bargain, while advocacy for an exceptional sentence by placing emphasis on aggravating factors will. *See Talley*, 134 Wn.2d at 186; *Sledge*, 133 Wn.2d at 843.

Here, the prosecutor consistently told the court he recommended the high end of the standard range. At the July 2000 sentencing hearing, the court found two aggravating factors-deliberate cruelty and domestic violence in the presence of the minor child-and imposed an exceptional sentence. When the trial court later decided it needed to conduct an evidentiary hearing to consider the evidence supporting an exceptional sentence, the prosecutor responded

that "[w]e of course are not proponents of an exceptional sentence in these proceedings," but asked if he should subpoena witnesses. Report of Proceedings (RP) at 563. The court asked him to subpoena Ms. Blakely and any witnesses who observed Ralphy during the kidnapping incident. However, the court added, the evidentiary hearing was probably an "exercise in futility," because there was no dispute that Mr. Blakely put his wife in an apple wood box and kept her there in the presence of Ralphy. RP at 564. Apparently the trial court intended to impose an exceptional sentence based on the record, regardless of the State's recommendation.

Most of the evidence challenged by Mr. Blakely was presented by the State in response to assertions by the defense. For instance, before the evidentiary hearing, the State filed a response brief to Mr. Blakely's motion for a standard range sentence. Mr. Blakely had argued that *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) prohibited the trial court from imposing an exceptional sentence based on facts that had not been established by a jury beyond a reasonable doubt. The State's response brief examined the precedential effect of *Apprendi* and concluded that "[t]he court is not required to provide the defendant with a jury trial on the issue of whether an exceptional sentence will be imposed." CP at 578. Defense counsel moved to withdraw the guilty plea on the basis that the State's response brief violated the plea agreement by advocating for an exceptional sentence. In response, the prosecutor stated, "I hope that I have never at any point done anything that the court has interpreted as advocating an exceptional sentence in this case, because I did have an agreement with counsel which prohibited me from doing that.' RP at 585. In denying the motion to withdraw the guilty plea, the court found that the State's response brief did not advocate a particular sentence and did not give "even the

narrowest suggestion of what the court ought to do." RP at 586.

As would be expected, the prosecutor's involvement in the evidentiary hearing was problematical. He was required to conduct examinations and cross-examinations of the witnesses in a manner that would present an accurate record to the court, while at the same time refraining from advocacy for the exceptional sentence he knew the court intended to impose. *See Talley*, 134 Wn.2d at 183. During the examination of Ms. Blakely, the prosecutor asked if she was afraid of Mr. Blakely during the kidnapping. She answered yes. It was the court, not the prosecutor, who asked a psychologist defense witness if Mr. Blakely could deliberately act in a cruel way. The witness answered that he could not make an opinion. Later, when the State presented the testimony of two mental health witnesses, the prosecutor anticipated the court's question and asked each of them if Mr. Blakely had the capacity to be cruel. Both answered that he did.

Following this testimony, the court asked the prosecutor if he wished to be heard regarding the sentence recommendation. He responded, "Judge, [I] don't want to be heard right now. My understanding was that we had an agreed recommendation for a high end sentence, and that's what I continue to recommend to the court. Unless counsel wants to deviate from that recommendation, I don't have anything to say." RP at 1038.

Compared to the "second thoughts" expressed in *Palodichuk*, 22 Wn. App. at 109, and the detailed summary of aggravating factors given by the prosecutor in *Sledge*, 133 Wn.2d at 843, the prosecutor's conduct here does not rise to advocacy for an exceptional sentence. Unlike in *Sledge*, where the State insisted upon the evidentiary hearing with witnesses, here defense counsel moved for the hearing. As

an officer of the court, the prosecutor was obliged to participate in the hearing, to call witnesses that would be helpful to the court, and to anticipate the questions the court wished to ask. *See Sledge*, 133 Wn.2d at 840. The State walks a thin line between, on the one hand, maintaining its duty to present relevant evidence and respond to the sentencing court's inquiries, and on the other hand, meeting its equally important obligation to uphold the plea agreement. *Talley*, 134 Wn.2d at 187. The important point is that the State must not in the process contradict its recommendation for a standard range sentence. *Sledge*, 133 Wn.2d at 840.

On balance, considering the sentencing court's conclusion from the start that undisputed facts in the record supported an exceptional sentence based on domestic violence and deliberate cruelty, the prosecutor's conduct in the evidentiary hearing did not undercut his insistence that he recommended a standard range sentence. Addressing this issue, the trial court noted that it tried to pay attention to the prosecutor's conduct in regard to the difficult position in which the State was put by having recommended to the court a sentence within the standard range, having the court indicate that an exceptional sentence may be appropriate, having the court indicate those subjects that would need to be presented at a sentencing hearing, and then having the laboring oar in presenting the testimonial matters to the court. RP at 1056. The sentencing court concluded that the prosecutor confined himself to the matters that concerned the court and did not advocate for an exceptional sentence. The record supports that conclusion. Consequently, the State did not breach the plea agreement.

EXCEPTIONAL SENTENCE

Mr. Blakely next challenges his exceptional sentence. The trial court found two aggravating factors: (1) Mr. Blakely's conduct during the kidnapping manifested

deliberate cruelty to his wife, former RCW 9.94A.390(2)(a) (1997); and (2) the offense involved domestic violence plus deliberate cruelty and commission within sight or sound of the victim's minor child, former RCW 9.94A.390(2)(h)(ii), (iii) (1997). Mr. Blakely contends the aggravating factors violate the real facts doctrine, former RCW 9.94A.370(2) (1996). He also contends the sentencing court violated the holding in *Apprendi*, 530 U.S. at 490, that requires a jury determination of the facts used to support an exceptional sentence outside the maximum range. Finally, he asserts the sentencing hearings violated due process by preventing defense counsel from cross-examining Ms. Blakely and by denying him the right to allocution.

I. The Real Facts Doctrine.

Under the Sentencing Reform Act of 1981, a trial court must impose a sentence within the standard range for the offense unless the court finds substantial and compelling reasons justifying an exceptional sentence. Former RCW 9.94A.120(1), (2) (1998); *State v. Ferguson*, 142 Wn.2d 631, 64344, 15 P.3d 1271 (2001). Several nonexclusive mitigating and aggravating factors are provided in former RCW 9.94A.390 (1997), including the mitigating circumstance of diminished capacity (former RCW 9.94A.390(1)(e) (1997)) and the aggravating circumstances mentioned above. In reviewing an exceptional sentence, this court asks three questions: (1) Are the reasons given by the sentencing court supported by the record, using the clearly erroneous standard of review? (2) Do the reasons justify departure from the standard range as a matter of law? (3) Is the sentence clearly too excessive or too lenient, using the abuse of discretion standard of review? *Ferguson*, 142 Wn.2d at 646.

Mr. Blakely contends the trial court erred as a matter of law in considering facts that established a more serious

crime than that to which he pleaded guilty. The so-called real facts doctrine of former RCW 9.94A.370(2) (1996) provides that the sentencing court generally may not use facts that establish a more serious crime or additional crimes as the basis for a sentence outside the presumptive range. In exchange for dismissing the charge of first degree kidnapping, the State agreed to allow Mr. Blakely to plead guilty to second degree kidnapping. As charged in the original information, the first degree kidnapping count alleged intentional abduction of a person with the intent to inflict extreme mental distress. RCW 9A.40.020(1)(d). Second degree kidnapping does not include the same intent element. RCW 9A.40.030. Mr. Blakely contends the finding of deliberate cruelty constitutes the same element as intent to inflict extreme mental distress, in effect allowing the court to sentence him for the more serious crime.

Deliberate cruelty has been defined as "gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain as an end in itself." *State v. Scott*, 72 Wn. App. 207, 214, 866 P.2d 1258 (1993), *aff'd sub nom. State v. Ritchee*, 126 Wn.2d 388, 894 P.2d 1308 (1995), quoted in *State v. Copeland*, 130 Wn.2d 244, 296, 922 P.2d 1304 (1996). In *Ferguson*, 142 Wn.2d at 648-49, the Supreme Court held that deliberate cruelty could not be used to elevate a sentence for second degree assault because an element of the charge is the intent to do bodily harm. The court found that the defendant's charged offense, intent to inflict harm by exposing another to the human immunodeficiency virus (HIV), implicitly contains elements that constitute deliberate cruelty. *Id.* at 651.

Citing *Ferguson*, Mr. Blakely contends deliberate cruelty is implicitly the same as the infliction of extreme mental distress element of first degree kidnapping, and therefore violates the real facts doctrine. But gratuitous violence with the intent to inflict emotional pain (deliberate

cruelty, *Scott*, 72 Wn. App. at 214) is not the same as the intent to inflict extreme mental distress. Even under the precedent of *Ferguson*, therefore, the real facts doctrine likely does not preclude deliberate cruelty as an aggravating factor in an exceptional sentence for second degree kidnapping. However, recognizing that *Ferguson* may direct a different conclusion, we decline to affirm the exceptional sentence on the basis of deliberate cruelty under former RCW 9.94A.390(2)(a) (1997). Instead, we find that the domestic violence aggravating factors alone support the exceptional sentence.

We begin by noting that the real facts doctrine does not apply to the domestic violence aggravating factors of former RCW 9.94A.390(2)(h) (1997). Former RCW 9.94A.370(2) (1996). The real facts statute specifically allows the court to consider acts of domestic violence that involve deliberate cruelty or intimidation of the victim as well as acts of domestic violence committed in the presence of the victim's or offender's minor child. Former RCW 9.94A.370(2) (1996); former RCW 9.94A.390(2)(h)(ii), (iii) (1997). Because the trial court found that these aggravating circumstances also supported a departure from the standard range, the exceptional sentence is justified as a matter of law.[4] *State v. Cardenas*, 129 Wn.2d 1, 12, 914 P.2d 57 (1996) (an appellate court may uphold an exceptional

---

[4] At oral argument, the State admitted that the trial court was not sure if the aggravating factor of domestic violence in the presence of the minor child, standing alone, would support an exceptional sentence. The record indicates, however, that the trial court considered deliberate cruelty and domestic violence with deliberate cruelty sufficient to support the sentence. Whether or not deliberate cruelty under former RCW 9.94A.390(2)(a) (1997) could be used to elevate the sentence for second degree kidnapping, the alternate basis of domestic violence with deliberate cruelty supports the exceptional sentence here. *State v. Cardenas*, 129 Wn.2d 1, 12, 914 P.2d 57 (1996).

sentence if satisfied that the trial court would have imposed the same sentence without the prohibited aggravating factor).

Mr. Blakely additionally contends that the sentence of 90 months is excessive in light of the standard range sentence of 13 to 17 months for second degree kidnapping. Former RCW 9.94A.310 (1998); former RCW 9.94A.320 (1998). He fails to take into consideration the firearm enhancement of 36 months, which makes the high end of the standard range for this crime 53 months. Former RCW 9.94A.310(3)(b) (1998). We will not disturb the trial court's discretion unless we find that no reasonable judge would have imposed the same sentence. *Cardenas*, 129 Wn.2d at 13. Here, the trial court stated that "[t]here is a part of the court's thinking that suggests that 90 months as an exceptional sentence is an insufficient judicial response to this conduct." RP at 1053. Given the circumstances of the crime, we cannot say that no reasonable judge would have made the same decision. *Cardenas*, 129 Wn.2d at 13.

II. Application of *Apprendi*.

Mr. Blakely contends the United States Supreme Court decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) provides that the factual basis for an exceptional sentence upward must be submitted to a jury and proved beyond a reasonable doubt. However, recently the Washington Supreme Court in *State v. Gore*, 143 Wn.2d 288, 314, 21 P.3d 262 (2001) held that *Apprendi* does not apply to factual determinations that support reasons for exceptional sentences upward. *Gore* held that Washington's statutory scheme permits a judge to impose an exceptional sentence within the maximum range determined by the Legislature. *Id.* at 313-14. Because the statutory and nonstatutory aggravating factors neither increase the maximum sentence nor define separate offenses calling for separate penalties, the *Apprendi* rule is not

triggered. *Id.* at 314. Consequently, the facts supporting the exceptional sentence here did not have to be submitted to a jury or proved beyond a reasonable doubt. *Id.* at 315; *see also State v. Hopkins*, 109 Wn. App. 558, 569, 36 P.3d 1080 (2001).

III. Due Process and the Sentencing Hearing.

During the first sentencing hearing, defense counsel did not cross-examine Ms. Blakely during her victim's statement. He now contends he was entitled by due process to confront the witnesses at the sentencing hearing and further contends he was not granted a formal opportunity for allocution.

The Sixth Amendment confrontation clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Generally, due process is satisfied in the context of a sentencing hearing as long as the defendant has an opportunity to rebut the evidence presented. *State v. Strauss*, 119 Wn.2d 401, 418-19, 832 P.2d 78 (1992). While the effect of the confrontation clause on sentencing hearings has not yet been established in Washington, *id.* at 414-15, we need not reach this issue here because Mr. Blakely was given the opportunity to cross-examine Ms. Blakely and all the other witnesses at the evidentiary hearing. Ms. Blakely's testimony in the first sentencing hearing constituted a victim impact statement rather than evidence to support an aggravating factor. *See* former RCW 9.94A.110 (1998). When she testified as a witness at the subsequent evidentiary hearing, however, defense counsel cross-examined her as extensively as he did all the other witnesses.

As for Mr. Blakely's right of allocution, he seems to argue that he was denied the opportunity to give a formal statement before sentence was pronounced. A defendant's

right of allocution is derived from state statutes and is not constitutional in nature. *In re Pers. Restraint of Echeverria*, 141 Wn.2d 323, 335, 6 P.3d 573 (2000). As with the victim impact statement, the offender is provided an opportunity to address the sentencing court before sentence is imposed. Former RCW 9.94A.110 (1998); *Echeverria*, 141 Wn.2d at 335. The statute does not require that the offender's statement be made immediately before imposition of the sentence and does not require a formal request from the court. *Id.* at 336.

In this case, the trial court asked Mr. Blakely at the first sentencing hearing and at the evidentiary hearing if there was anything he wanted to say. On both occasions Mr. Blakely took the opportunity to explain to the court his version of the events and the motivations of the witnesses against him. Although the trial court did not specifically ask Mr. Blakely if he had anything to say in mitigation of the sentence-the better course to scrupulously comply with former RCW 9.94A.110 (1998), according to *Echeverria*, 141 Wn.2d at 336-37-clearly Mr. Blakely understood that he was asked whether he had information that supported a lower sentence.

PRO SE ISSUES

Mr. Blakely raises additional issues pro se, including contentions that the State withheld evidence, that the weapon enhancement was added as retaliation for Mr. Blakely's complaints against jail conditions, and that his counsel was ineffective.

According to the pro se brief, the State failed to produce the registration on the truck used in the kidnapping and withheld evidence that proved Ms. Blakely used poison to control his actions during the kidnapping. Mr. Blakely also alleges that the prosecutor withheld a copy of a 1995

social security disability form that shows his wife attempted to cheat the government by forging Mr. Blakely's name to a false claim. Besides the fact that Mr. Blakely fails to show how the alleged withholding of this evidence affected his guilty plea, he also fails to show any reference in the record to the purported evidence. Matters mentioned in the brief but not included in the record cannot be considered on appeal. *State v. Stockton*, 97 Wn.2d 528, 530, 647 P.2d 21 (1982), cited in *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Similarly, the record shows no evidence to support an inference that the State added the deadly weapon enhancement in retaliation for Mr. Blakely's threat to sue Grant County for intolerable jail conditions. In April 2000, Mr. Blakely filed "A Claim for Discrimination and Negligence and Punishment" that alleged he had been forced to live in isolation with bacterial and viral infections, had been denied an operation that would have fixed his "brain functions," and had been mistreated by inmates and staff at the jail. CP at 399-400. He requested a settlement of $5 million on the claim. Beyond the accusations in the claim, nothing in the record supports the validity of these assertions. The amended information adding the deadly weapon enhancement to the two first degree kidnapping charges was filed in July 2000. Although the amendment was made after Mr. Blakely's discrimination claim, nothing in the record supports an inference that it was made in retaliation for Mr. Blakely's threat to sue.

Insufficient record also defeats Mr. Blakely's contention that he received ineffective assistance of counsel. To prove ineffective counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness and that counsel's representation prejudiced the defendant. *McFarland*, 127 Wn.2d at 334-35. Attorney competency is determined based only on the record below.

Id. at 335. We engage a strong presumption that counsel was effective. *Id.* Mr. Blakely contends his counsel was deficient in failing to attend his court-ordered mental health evaluations, in pressuring him to enter into the guilty plea without explaining the possible sentence, and in failing to gather the necessary evidence to impeach his wife's testimony.

Defendants in noncapital cases generally do not have a right to have counsel present during psychological examinations. *State v. Decker*, 68 Wn. App. 246, 251, 842 P.2d 500 (1992). Counsel may attend, but strictly as an observer, not as an active participant. *State v. Nuss*, 52 Wn. App. 735, 741, 763 P.2d 1249 (1988). When a defense of diminished capacity is raised, the defendant waives his privilege against self-incrimination. *Id.* at 742. Nothing in the record indicates that Mr. Blakely ever requested the presence of counsel at his mental health evaluations or that the presence of counsel would have been of any benefit to his case.

The record also fails to show that defense counsel pressured Mr. Blakely to accept the terms of the plea agreement. A guilty plea must be entered knowingly, voluntarily, and intelligently. *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). The defendant must understand the plea's direct sentencing consequences. *Id.* A claim that the defendant was coerced to plead guilty must be supported with more than self-serving allegations. *State v. Osborne*, 102 Wn.2d 87, 97, 684 P.2d 683 (1984).

During the hearing on the plea agreement held in July 2000, the court asked Mr. Blakely if he understood the terms of the agreement, the sentence range, and the fact that the trial court was not bound by the terms of the agreement to impose the sentence recommended by the State. Mr. Blakely first asked to die and claimed his mind was not clear due to

lack of sleep, but eventually agreed that he understood. He went over the plea agreement with the court and with trial counsel before signing. Only later did he claim his doctors and lawyers pressured him into signing the agreement. Nothing in the record beyond his bare assertion of fact supports his allegations that the plea was involuntary.

Finally, the record does not support Mr. Blakely's assertion that defense counsel failed to investigate evidence that Ms. Blakely orchestrated the kidnapping by poisoning her husband and controlling his mind. As with the other claims of ineffective assistance of counsel, our review on direct appeal is limited to matters within the trial record. *McFarland*, 127 Wn.2d at 335. With support for Mr. Blakely's claims nonexistent in this record, we are compelled to find that defense counsel's representation was effective.

Affirmed.

/s/
Schultheis, J.

WE CONCUR:

/s/
Sweeney, J.

/s/
Kurtz, J.

SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF GRANT

STATE OF WASHINGTON,	)	
	)	No. 98-1-00610-5
Plaintiff,	)	
	)	FINDINGS OF
vs.	)	FACT &
	)	CONCLUSIONS
HOWARD RALPH BLAKELY,	)	OF LAW RE:
	)	EXCEPTIONAL
Defendant.	)	SENTENCE
	)	

An exceptional sentence above the standard range should be imposed herein based upon the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The defendant and Yolanda Blakely married in 1973. They raised three children, Becky, Lorene and Ralph III (Ralphy). In May 1995, Yolanda left the family home with Lorene and Ralphy, eventually settling in Spokane. There she filed a divorce action in August, 1995.

2. During the marriage, the Blakelys created a trust, known as the Blakely Fay Trust, as a tax shelter. In 1996, Yolanda commenced a lawsuit to unravel the trust. There was also other litigation, and a great deal of animosity, between the Blakelys after their separation. Mrs. Blakely obtained a restraining order in the divorce case to prohibit the defendant from approaching her or her home.

3. The Blakelys acquired a considerable number of real properties, including a home, ranch and development property in Three Forks, Montana, an orchard and home in

Grant County, a lake home, and several rental properties. In December, 1997, Mrs. Blakely obtained from the Spokane divorce court authority to occupy the home and orchard. She moved to that property and undertook management of the orchard in January, 1998. In June, 1998, Ralphy joined her, having remained in Spokane to finish the seventh grade. Yolanda obtained a modification of the subsisting restraining order to prohibit the defendant from approaching the orchard property.

4. In October, 1998, Ralphy was attending 8th grade in Royal City and helping with the orchard. Harvest was completed around mid-October. Ralphy regularly left on a bus for school around 6:00 a.m., and returned on a bus about 6:00 to 6:30 p.m., after football practice.

5. The Blakely home was located in roughly the middle of the east side of the orchard. Just after 3:00 p.m. on October 26, Yolanda walked from the area of the house to the southeast corner of the property, about 900 feet, along a road/driveway, to retrieve her mail. As she returned, the defendant emerged from the apple trees south of the house. He approached Yolanda, pointing out a spider on her mail. As she disposed of the spider, she saw that the defendant appeared very angry. He grabbed her wrists and arms, twisting them. A scuffle ensued.

6. The defendant got Yolanda down on the ground near the first row of trees. He pinned her to the ground by painfully driving his knee into her ribs, and pulled a roll of duct tape from a plastic sack in his rear pocket. He attempted to cover her mouth with duct tape, wrapping it several times around her head, face and chin. He taped her wrists together very tightly.

7. The defendant carried Yolanda to an area between the rows of apple trees. In a very angry voice, the defendant said

during this time, "You had no business filing the divorce--I want it dismissed;" "I want the trust litigation dismissed;" and "cooperate with me so you won't get hurt any more." The defendant walked Yolanda west through the orchard on a service road, saying, "We need to get ahold of Lorene to help get the trust litigation dismissed." He also mentioned "O.J." and a "Dr._____" getting away with what they did, suggesting he would too.

8. At the end of the service road, the defendant led Yolanda south to a place where he had hidden his pickup truck from view in some willow trees near the southwest corner of the orchard. He told her that he had many guns and ammunition, and several knives, with him. He told her that if she failed to cooperate, they were both going to die.

9. Mr. Blakely opened the lift gate of the pickup canopy, revealing in the bed of the pickup a coffin-like plywood box. He produced a knife, and ordered Yolanda to climb into the box. Yolanda climbed slowly over the pickup tailgate, and the defendant held the knife close to her face, demanding that she hurry. When she lay down in the box, the defendant closed and latched the lid. The interior of the box is approximately the same width as, and about three inches longer than, Yolanda's body. Air holes had been drilled in the lid and ends of the box.

10. The defendant then drove the pickup rapidly through the orchard to an area between tree rows near the back of the house. He then opened the box lid and held the knife to Yolanda's face, demanding to know where her car keys were. He then shut the box again. He brought Yolanda's Ford car to the same vicinity, and apparently began to load belongings from the house into the vehicles. On about four more occasions, the defendant opened the plywood box to extract information from Yolanda, such as when Ralphy would be home, where certain property items and documents could be

found, and the address of the Blakely's oldest daughter, Becky. Throughout this process, the defendant appeared to grow increasingly agitated and mean. He pressed the knife blade to Yolanda's throat or nostrils to compel her compliance, telling her he had just sharpened the knife, that he could cut her right now, and that she'd bleed to death.

11. As night fell, Yolanda complained of being cold and the defendant placed a blanket in the plywood box over her. After she heard the school bus stop out on the road, Yolanda attempted to holler and bang her feet on the box to warn her son of the danger. As Ralphy, then age 13, walked up the dark driveway, the defendant emerged from between the apple trees. He said, "Your mother's in great danger. Come with me and don't cause any trouble." Ralphy saw the knife, and the defendant said that he was desperate, and would use the knife if he needed to.

12. The defendant led Ralphy behind the orchard shop and house to a space between the 4th and 5th tree rows, where he saw the defendant's pickup and his mother's car. He heard yelling and kicking from inside the pickup, and heard his mother cry out, "Ralphy, are you okay?" and "Don't hurt him, Howard!" The defendant opened the lift gate and Ralphy saw the wooden box, but it remained closed. The defendant advised Ralphy that they were leaving, and he was going with them. He began to direct Ralphy to prepare to depart.

13. The defendant permitted his son to use the bathroom inside the house, and Ralphy used the opportunity to attempt to locate a pistol in his mother's closet, but was unable to find it. Before departing the orchard property, the defendant told Ralphy that he had a loaded shotgun in the pickup and if Ralphy "tried anything," all the defendant had to do was turn it around toward the wooden box and pull the trigger.

14. The defendant directed Ralphy, age 13, to drive his mother's car, and defendant drove his pickup with Yolanda inside the wooden box. After driving approximately five miles, the two vehicles stopped at the Mar Don Resort store for gas, but it was closed. The defendant opened the pickup canopy lift gate and opened the lid of the wooden box "to give [Yolanda] some air." At that time, Ralphy first saw his mother, wrapped in a blanket, inside the box. He saw the duct tape wrapped around her face and head. The defendant repeated to Ralphy the warning that his mother's safety depended on his cooperation.

15. It was decided the party would drive to Ernie's Truck Stop on the outskirts of Moses Lake for gas (at Yolanda Blakely's suggestion. After driving another ten miles, defendant stopped again and opened the wooden box, just before entering Highway 17 about two miles south of Ernie's. Upon arriving at the truck stop, defendant drove his pickup far to the rear of the property, behind several parked trucks, and instructed Ralphy on the routine they would follow to fuel the vehicles and pay for the fuel. Defendant first pulled the pickup to the pumps and filled its tank; then Ralphy pulled the car to the pumps and fueled it. Defendant and Ralphy then entered the truck stop store.

16. As the defendant reached the cashier's counter, Ralphy suddenly moved to a second cashier and shouted, "Call 9-1-1! Help us! He kidnapped us! He has my mom in a box!" The defendant grabbed Ralphy by the arm and dragged him from the store. Ralphy tried to prevent his removal by clinging to the door jamb, but was dragged outside. There the scuffling continued, until some truck drivers hollered at the defendant to leave the boy alone. The defendant then released Ralphy and ran to the cab of the pickup.

17. Ralphy chased after the defendant and jumped on the rear bumper, attempting to open the box to free his mother. The defendant drove rapidly out of the truck stop lot, shaking Ralphy loose from the vehicle as it bumped over the gutter. Ralphy ran back into the store, where the clerk had reached the 9-1-1 operator, and he provided a description of the defendant and his pickup to the operator.

18. The defendant drove south on Highway 17. Because the lift gate was up, Yolanda was nauseated by the diesel fumes entering the wooden box. After about half an hour, the defendant stopped the pickup. Just before the stop, the lid of the wooden box became unlatched and Yolanda was able to sit up briefly. She realized they were near a cattle feed lot in the area of Warden.

19. The defendant was angry and agitated, shouting "Ralphy ruined everything!" Yolanda told the defendant she felt sick and needed to urinate. He helped her out of the box (where she had remained for approximately four hours) and, because her hands were taped, assisted in pulling down her pants so she could empty her bladder. His tone was urgent, demanding and angry. He instructed her that she could now ride in the cab as long as her wrists remained bound, and roughly removed the tape (along with some hair) from her head and face. In the cab, the defendant again displayed the knife to Yolanda, then laid it in her view on the dashboard ledge. He instructed her that, if they were stopped, she must tell the police that she was accompanying defendant of her own free will.

20. The defendant had piled food, water, business files and other items next to the passenger door, so Yolanda had to sit next to him in the cab. They eventually drove from Warden to Lind, on Highway 26 to Colfax, Highway 195 to Pullman and Lewiston, Idaho, Highway 12 to Orofino, Idaho,

Lolo, Montana and Missoula, Montana, and 1-90 to Three Forks, Montana.

21. At some point in Idaho, defendant removed the tape from Yolanda's wrists. The two discussed issues relating to their divorce. They shared a banana.

22. East of Orofino, one of the pickup's tires blew. The defendant responded angrily to the frustration and delay of changing the tire. He ordered Yolanda back into the wooden box, where she stayed for approximately 45 minutes while defendant changed the tire. Later, as they neared Lolo, the defendant stopped and ordered Yolanda back into the wooden box so that he could stop for gas. He drove a short distance to a gas station, filled the tank, and drove on for a while before stopping to let Yolanda out of the box. She spent about half an hour in the box on this occasion.

23. Exiting 1-90 at Three Forks, the defendant stopped at a farm and ordered Yolanda back into the wooden box. He then drove a short distance, used a pay phone, then drove rapidly along a road Yolanda recognized from its extreme dustiness and bumps, and from cattle guards over which the pickup traveled. The Blakely's Montana home is on this road nearby. Defendant finally stopped the pickup and, after a delay, opened the lift gate and wooden box. Yolanda emerged cramped, bruised, gasping for air, her legs "asleep." They were at the home of Mary Gillespie, whom Yolanda had not before met.

24. Yolanda was allowed to clean up in Ms. Gillespie's bathroom. When the defendant returned briefly to the pickup, Ms. Gillespie and Yolanda formulated a plan to contact the police. While at the home, the defendant telephoned his friend Ilse Barros, telling her that he had kidnapped Yolanda and Ralphy, that Ralphy had gotten away, and that the defendant was in trouble. He called

daughter Lorene, telling her to go to Moses Lake to find Ralphy and to call "the lawyers" to stop both the divorce and trust litigation. He told Lorene Yolanda was sleeping, but when Lorene heard Yolanda speaking in the background, the defendant allowed Yolanda to talk to Lorene, instructing her what to say. The defendant also called a stock broker in Billings, received some price quotations and gave the broker certain sell orders. The defendant discussed with Yolanda the trust litigation and sale of the Grant County orchard, which he insisted be done immediately. He instructed Mary Gillespie to retrieve from his father (who was staying nearby) a copy of the legal description of the Blakelys' Logan, Montana property-which had been titled in Yolanda's name-so that he could prepare a deed for Yolanda to sign. He sat at the kitchen table and began to do some typing when he looked outside and saw that the house was surrounded by police officers.

25. The defendant instructed Yolanda to go outside and tell the police she had come voluntarily. Yolanda walked out and told the police of the kidnapping. Ultimately, the defendant was taken into custody without incident.

26. At various times since 1972, the defendant has been assessed by mental health professionals. He has been diagnosed as suffering from schizophrenia, paranoid type, on several occasions. He has been diagnosed by others as being free of any such psychosis, but having a pervasive personality disorder. The most thorough evaluation of the defendant's mental status was accomplished at Eastern State Hospital during the pretrial course of this case.

27. Defendant has an (Axis II) Paranoid personality disorder with schizotypal traits and a Narcissistic personality disorder with antisocial traits. Because of the first disorder, the defendant tends to experience life through a pervasive distrust and suspiciousness of others, a conviction that others

are exploiting, harming or deceiving him, a doubt of the loyalty or trustworthiness of friends and associates, a reluctance to confide in others due to a fear that the disclosures will be maliciously used against him. He reads hidden or threatening meaning into innocuous or neutral events, perceives attacks on his character that are not apparent, and bears persistent grudges. These traits are not limited to times when the defendant is experiencing a mood disorder, that is, they constitute lifelong patterns not caused by a medical problem.

28. Because of the narcissistic personality disorder, the defendant tends to have a grandiose sense of his own importance and to exaggerate his own achievements and talents. He expects to be recognized as superior without commensurate achievements, and is pre-occupied with ideas of importance and ideal love. He feels "entitlement" and that he is "special." The defendant lacks empathy, is envious and believes others are envious of him, and tends toward arrogant, haughty behavior.

29. The defendant's personality disorders influence and direct, but do not cause, his behavior. Defendant is able to sufficiently perceive the impacts of his conduct on others to behave with deliberate cruelty.

30. The kidnapping of Yolanda Blakely by the defendant was a domestic violence offense.

31. The defendant's motivation to commit kidnapping was complex, contributed to by his mental condition and personality disorders, the pressures of the divorce litigation, the impending trust litigation trial and anger over his troubled interpersonal relationships with his spouse and children. While he misguidedly intended to forcefully reunite his family, his attempt to do so was subservient to his desire to terminate lawsuits and modify title ownerships to his benefit.

32. The defendant's methods were more homogeneous than his motive. He used stealth and surprise, and took advantage of the victim's isolation. He immediately employed physical violence, restrained the victim with tape, and threatened her with injury and death to herself and others. He immediately coerced the victim into providing information by the threatening application of a knife. He violated a subsisting restraining order.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the court makes the following Conclusions of Law:

1. As described in RCW 9.94A.390(l)(e), the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired by his personality disorders, but not significantly so. Defendant's personality disorders did not significantly impair his capacity to act with deliberate cruelty.

2. Repeatedly and protractedly confining his victim in a coffin-like box manifested deliberate cruelty to the victim, as described in RCW 9.94A.390(2)(a).

3. As described in RCW 9.94A.390(2)(h), the current offense involved domestic violence, as defined in RCW 10.99.020, and occurred within sight and sound of the victim and defendant's minor child. The defendant's conduct manifested deliberate cruelty to, and intimidation of, the victim.

4. Considering the purposes of chapter 9.94A RCW, and in light of a standard range for kidnapping in the second degree of 13 to 17 months (enhanced to 49 to 53 months by

firearm enhancement), the foregoing findings of fact and conclusions of law constitute substantial and compelling reasons justifying an exceptional, aggravated sentence.

5. A sentence of 90 months incarceration is a just and deserved punishment for defendant's conduct.

DONE IN OPEN COURT this 13 day of Nov., 2000.

/s/ Evan E. Sperline
JUDGE

SUPERIOR COURT OF WASHINGTON
FOR GRANT COUNTY

STATE OF WASHINGTON,	)	
	)	No. 98-1-00610-5
Plaintiff,	)	
	)	JUDGMENT AND
vs.	)	SENTENCE (JS)
	)	
HOWARD RALPH BLAKELY,	)	[√] Prison
	)	
Defendant.	)	[ ] Clerk's action
SID# WA15275162; DOB 6-3-36	)	required, firearms
AGENCY: GCSO 98-GS12773	)	rights revoked 5.6

I. HEARING

1.1 A sentencing hearing was held present were:
Defendant: HOWARD RALPH BLAKELY
Defendant's Lawyer: Doug Phelps
(Deputy) Prosecuting Attorney: John Knodell

II. FINDINGS

There being no reason why judgment should not be pronounced, the Court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on July 17, 2000 by Plea

COUNT	CRIME with RCW	CRIME DATE
1	KIDNAPPING IN THE SECOND DEGREE, DOMESTIC VIOLENCE, RCW 9A.40.030(1), 10.99.020 & RCW 9.94A.125 (CRIME CODE 00655)	October 26, 1998
2	ASSAULT IN THE SECOND DEGREE, DOMESTIC VIOLENCE, RCW 9A.36.021(1)(c) & 10.99.020 (CRIME CODE 01035)	October 26, 1998

as charged in the Information

[X] A special verdict finding for use of **firearm** was returned on Count(s) 1 RCW 9.94A.125.310.
[ ] A special verdict/finding for use of **deadly weapon other than a firearm** was returned on Count(s) _ RCW 9.94A.125, .310
[ ] A special verdict/finding of **sexual motivation** was returned on Count(s) _ RCW 9.94A.127
[ ] A special verdict/finding for **Violation of the Uniform Controlled Substances Act** was returned on Count(s) __ RCW 69.50.401 and RCW 69.50.435, taking place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.
[ ] A special verdict/finding that the defendant committed a crime involving the manufacture of methamphetamine **when a juvenile was present in or upon the premises of manufacture** was returned on Count(s). RCW 9.94A,-RC W 69.500.401(a), RCW 69.50.440.
[ ] The defendant was convicted of **vehicular homicide** which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030.
[ ] This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.

[ ] The court finds that the offender has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.
[X] The crime charged in Counts 1 & 2 involves **domestic violence**.
[ ] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.400):

CURRENT OFFENSES ENCOMPASSING
N/A

[ ] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

OTHER CURRENT OFFENSES USED IN CALCULATING OFFENDER SCORE
N/A

2.2 CRIMINAL HISTORY (RCW 9.94A.360):

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J	TYPE OF CRIME
1	Grand Larceny Washes	Unk	Bozeman, MT	12-6-54	A	NV
2	Petty Larceny	Unk	Aurora, CO	11-8/63	A	Unk
3	Assault/ Contempt of Court	Unk	Littleton, CO	8/17/66	A	Unk
4	Larceny	Unk	Big Horn County, WY	5-5-69	A	NV
5	Kidnapping Washes	Unk	Powell, WY	5-14-69	A	V
6	False income tax return, conspiracy subscribe false income tax returns	Unk	Spokane, WA	6-3-87	A	Unk

[ ] The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.360.
[ ] The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.360):

PRIOR CONVICTIONS ENCOMPASSING
N/A

[ ] The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

PRIOR CONVICTIONS COUNTED AS ENHANCEMENTS

2.3 SENTENCING DATA:

Count No.	Offender Score	Seriousness Level	Standard Range (not including enhance-ments)	Plus Enhance-ment*	Total Standard Range (including enhance-ments)	Maximum Term
1	2	V	13-17 mos.	F	49-53 mos.	10 years
2	2	IV	12+-14 mos.	N/A	12+-14 mos.	10 years

*(F) Firearm, (D) Other deadly weapons, (V) VUCSA in protected zone, (VH) Veh. Hom., See RCW 46.61.520, (JP) Juvenile Present

* * *

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1

3.2 [ ] The Court DISMISSES Counts N/A
[ ] The defendant is found NOT GUILTY of Counts N/A

IV. SENTENCE AND ORDER

IT IS ORDERED:

* * *

4.3 The defendant HOWARD RALPH BLAKELY shall not have contact with Yolanda Blakely (dob 2-20-56) and Ralphy H. Blakely (dob 01-01-85) name, DOB, including, but not limited to, personal, verbal, telephonic, written or contact through a third party for _____ years (not to exceed the maximum statutory sentence)

* * *

4.5 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:
(a) CONFINEMENT. RCW 9.94A.400. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

*90	months on Count	1		months on Count	
14	months on Count	2		months on Count	
	months on Count			months on Count	

* Exceptional sentence; Findings of Fact and Conclusions of Law are attached

Actual number of months of total confinement ordered is: __
(Add mandatory firearm and deadly weapon enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

_____

The sentence herein shall run consecutively with the sentence in cause number(s) _____
but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.400.

Confinement shall commence immediately unless otherwise set forth here: _____

_____

(b) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.120. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court:

_____

4.6 [√] COMMUNITY PLACEMENT is ordered as follows: Count 1 and 2 for 12 months; Count ___ for ___ months; Count ___ for ___ months.

* * *

[√] Defendant shall have no contact with: Any member of victim's immediate family.

* * *

[√] The defendant shall undergo an evaluation for treatment for [ ] domestic violence [ ] substance abuse [√] mental health [ ] anger management and fully comply with all recommended treatment.

* * *

DONE in Open Court and in the presence of the defendant this date: 11/13, 2000.

/s/ _____
EVAN E. SPERLINE, JUDGE

/s/	/s/	/s/
John Knodell	Doug Phelps	HOWARD RALPH BLAKELY,
WSBA #11284	WSBA #22920	Defendant
(Deputy)	Attorney for	
Prosecuting Attorney	Defendant	

Translator signature/Print name: _____

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

SUPREME COURT OF WASHINGTON

State
v.
Howard R. Blakely

No. 72785-6
February 04, 2003

Appeal From: 19545-7-III, 111 Wash. App. 851,
47 P.3d 149

Petition for Review: Denied.

SUPERIOR COURT OF WASHINGTON

IN AND FOR THE COUNTY OF GRANT

STATE OF WASHINGTON,	)	
	)	No. 98-1-00610-5
Plaintiff,	)	
	)	
vs.	)	
	)	
HOWARD RALPH BLAKELY,	)	
	)	
Defendant.	)	
	)	

VERBATIM REPORT OF PROCEEDINGS

July 31, 2000

Before the Honorable Evan E. Sperline
Grant County Superior Court
Department 2

APPEARANCES:

FOR THE PLAINTIFF: JOHN KNODELL
Prosecuting Attorney

FOR THE DEFENDANT: DOUGLAS PHELPS
Phelps and Associates

CCR NO. CA-SE-*J-A26908

THE COURT: . . . Is there any reason that sentence should not now be imposed?

MR. PHELPS: Your Honor, if I could respond? And I haven't had an opportunity to cross-examine this witness. Some things that she said, I've never heard of before. And other things could be -- I think, could assist the Court by way of cross-examination of this witness. I haven't had that opportunity. Some of the things that she did say to the Court I think go to the heart of the defense that we would have presented, and I think Mr. Blakely's statement today, although it was somewhat rambling, might enlighten the Court if we could review it in a written form.

But Mr. Blakely and I think the Court has reviewed, probably, the psychological evaluations that we've submitted from the three doctors that we have.

THE COURT: I have.

MR. PHELPS: And also Dr. Cressy (phonetic). Did you get Dr. Cressy's (phonetic) statement?

THE COURT: Yes.

MR. PHELPS: And Dr. Fredricks? But oddly enough as it may seem, she stated this was an attempt by Mr. Blakely to reunite his family, and he didn't view this as a kidnapping or illegal act, but he viewed it as an honest attempt to renew his family, or somehow avoid the break-up of that particular family.

And the operation he alludes to is what he calls a stem cell transplant that he believes will help his mental state and fix his mental problem -- what he uses -- not his mental problems, but his thought process problems. And also that of a son, another son, who resides in Montana.

As she stated, your Honor -- as she stated in our interview, Mr. Blakely was very tired -- what she views as tired, indicates that he was falling asleep and at one point indicates he was driving on the wrong side of the road on the trip back there, and she indicated in our interview, she offered to help him drive, because she was concerned he might fall asleep. And additionally, your Honor, there were blankets placed in the back of the box at one point, and pillows, and I think the FBI or the Gallatin county sheriff's department would -- based upon our interview with the Gallatin county sheriff department and some other witnesses involved in this.

Your Honor, suffice it to say my client suffers from a long history of psychiatric problems. I think everyone will agree to that. The question is what type of psychiatric problems. An unfortunate incident occurred as a result of that, and we'd ask the Court to follow the recommendations that have been given as a -- I think it will show that my client has a history of paranoid schizophrenia, and was acting not under the understanding of what he was doing was indeed criminal, but was under the understanding that what he was doing was an attempt to reunite his family.

And again, it might be helpful to the Court if I had an opportunity to cross-examine this witness. I won't take up a lot of time, but the information that you have before you, from the psychiatric evaluations, I think would be helpful in evaluating this.

THE COURT: Mr. Knodell?

MR. KNODELL: Can I just respond to that? There is some interesting material in Dr. Bogmill's (phonetic) report on Mr. Blakely. Mr. Blakely was given an incomplete sentences test in which he expressed a great disgust with our

legal system here. But also indicated a real problem with women. Says he'd like to reconcile his family. Says he regretted that society had eliminated control of the father over the family and men are not what they used to be in society. Went on to say that women should take over responsibility of the home life, men are not what they used to be in today's society.

And Dr. Bogmill (phonetic) went on to say in some other testing, that the defendant was rigid, overvalues his own worth, overevaluates his own worth, tends to utilize repression and denial excessively and manifests little or no insight into his own motivations. Goes on to say he's someone that is depressed, resentful, angry, and hostile.

We all talk about spin these days, but our position I think is clear to the Court, especially in view of Dr. Cressy (phonetic) and Dr. Fredrickson, the conclusions they came to, the kind of illness Mr. Phelps is talking to, the kind of illness Mr. Blakely is suffering from is the kind of illness most men who abuse their women suffer from. Mr. Blakely believed -- and in our view this is not insanity, he felt he had the right as the man of the family to coerce or do whatever he wanted to the family to keep it together. That is not insanity.

If you look at the documents, there has been a long history of this type of behavior, we think it is criminal, and Mr. Blakely in a number of ways also indicated that he knew it was against the law.

THE COURT: There always has been, in this case, a great deal of dispute about such things as Mr. Blakely's mental condition at the time that these offenses occurred, Mr. Blakely's motivation for doing what he did, Mr. Blakely's competence to proceed with judicial proceedings, and the other questions regarding potential defenses, such as being invited or entrapped in some way.

Mr. Blakely focuses somewhat unwaveringly on what he refers to as deception, or the art of deception.

To the Court, most, if not all of those issues have been resolved, and they were resolved by way of a plea of guilty. With all due respect, Counsel invites the Court in some ways to proceed as though Mr. Blakely had prevailed on a defense of insanity, which he did not. He waived that defense by pleading guilty.

In many ways, the question of what Mr. Blakely's ultimate goal was is also irrelevant to the Court. Picture yourself as the victim of this crime, and tell me whether it matters to you whether the perpetrator's goal is to do you harm or to reunite his family.

Mr. Blakely pled guilty to assault in the second degree, which carries under the circumstances of this case a standard range sentence of twelve to fourteen months. Fourteen months is imposed as to Count 2.

As to Count 1, kidnapping in the second degree, the standard range is thirteen to seventeen months. Because of a firearm or weapon enhancement, the standard range becomes forty-nine to fifty-three months. The Court is satisfied that there are compelling reasons in this record for a sentence within the standard range to be too lenient. Primarily, I refer to two factors in RCW 9.94A, Section 390. The first of those is that the defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

Many, many cases have come before this Court, when a person has been abducted in a way that involves the use of force, or the threat of force, or the display or offered use of a weapon, but to accomplish his goal, even a goal that in some perverted way is seen as beneficial, by putting the victim in a wooden box and latching it shut, is deliberate cruelty. There

is no other way for thinking people to see it. It goes beyond all that would have been necessary to accomplish the criminal intent, and falls squarely within what this Court and I think any reasoning person would see as not only cruelty, but deliberate cruelty, inflicted upon the victim.

In addition, in that same statute, another aggravating circumstance is that the offense occurred within sight or sound -- excuse me. The factor is, the current offense involved domestic violence, and one or more of the following was present: And one of the following is, the offense occurred within sight or sound of the victim's or the offender's minor children, under the age of eighteen years.

Mr. Blakely not only forcibly kidnapped his estranged wife and did it in the deliberately cruel way that I indicated, but put his son in the position of frantically reporting that to anyone he could notify. To watching it happen. That circumstance must forever imprint and distort the way that this child will think of his parents. Both of his parents.

The sentence, even enhanced with a firearm or weapon enhancement to fifty-three months, is clearly too lenient, given this conduct. The Court is limited to the statutory maximum, which is ten years, or a hundred and twenty months. The Court has imposed ninety months on Count 1, to be served in the state prison. That is an exceptional sentence. Mr. Blakely has, by virtue of that fact, the right to appeal the Court's sentence. Twelve months of community placement is ordered.

The Court will require an appendix to the sentence that recites the basic facts of the crime, including the use of the wooden box and the presence of the minor victim, that that concludes that the aggravating circumstances set forth in Section 390, 1A,-- strike that -- 2A, and 2H, sub 2, are

present. This matter will need to be brought back before the Court for approval of the appendix justifying the exceptional sentence.

MR. KNODELL: Can I ask, what's the Court's schedule today? Or maybe I should ask Mr. Phelps. Would it be better to maybe note this on for next week?

MR. PHELPS: That would be fine.

MR. KNODELL: And I'll provide Mr. Phelps with a copy. I just have a couple of questions. So what we need to prepare is a Findings of Fact and Conclusions of Law, as we would --

THE COURT: That's correct.

MR. KNODELL: The other question is, is the Court finding that the two factors which you have enumerated, that the conduct, cruelty, and second, domestic violence in the -- in the sight or sound of minor children -- are each of them independent grounds for an exceptional sentence?

THE COURT: I have not reached that conclusion or considered whether independently they would be. I can only tell you that -- and I don't rule it out. I only tell you that in my mind, the combination of those factors justifies the exceptional sentence.

MR. KNODELL: It may have some relevance. And I'd just point this out. If the case goes up to appeal, the Court of Appeals may want to know, in reaching a decision whether remand is appropriate or not, in the event that one they don't find grounds for -- either one -- excuse me, one of them -- whether the surviving ground was independently, in the Court's mind, sufficient.

THE COURT: I can certainly say that the deliberate cruelty that I've indicated would justify the exceptional sentence on its own, and an exceptional sentence of the magnitude imposed by the Court. I think in regard to the domestic violence perpetrated in the presence of the minor child of these parties, that that factor in and of itself would justify an exceptional sentence. I can't say that I've reached a conclusion as to whether or not it would justify an exceptional sentence of the magnitude that I've set forth.

MR. KNODELL: Very well. I'll draft it up then.

THE COURT: We'll continue this to next Monday, the 7th of August, 9:00 a.m., for entry of the Findings and Conclusions, and entry of the Judgment and Sentence. That's all in this matter.

RELEVANT PROVISIONS OF THE REVISED CODE OF WASHINGTON

Chapter 9.94A
Sentencing Reform Act of 1981

9.94A.010. Purpose

The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to add a new chapter to Title 9 RCW designed to:

(1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;

(2) Promote respect for the law by providing punishment which is just;

(3) Be commensurate with the punishment imposed on others committing similar offenses;

(4) Protect the public;

(5) Offer the offender an opportunity to improve him or herself; and

(6) Make frugal use of the State's resources.

* * *

9.94A.120. Sentences

When a person is convicted of a felony, the court shall impose punishment as provided in this section.

(1) Except as authorized in subsections (2), (4), (5), (6), and (8) of this section, a court shall impose a sentence within the sentence range for the offense.

(2) The court may impose a sentence outside the standard sentence range for that offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

(3) Whenever a sentence outside the sentencing range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard range shall be a determinate sentence.

(4) A persistent offender shall be sentenced to a term of total confinement for life without the possibility of parole or, when authorized by RCW 10.95.030 for the crime of aggravated murder in the first degree, sentenced to death, notwithstanding the maximum sentence under any other law. An offender convicted of the crime of murder in the first degree shall be sentenced to a term of total confinement not less than twenty years. An offender convicted of the crime of assault in the first degree or assault of a child in the first degree where the offender used force or means likely to result in death or intended to kill the victim shall be sentenced to a term of total confinement not less than five years. An offender convicted of the crime of rape in the first degree shall be sentenced to a term of total confinement not less than five years. The foregoing minimum terms of total confinement are mandatory and shall not be varied or modified as provided in subsection (2) of this section. In addition, all offenders subject to the provisions of this subsection shall not be eligible for community custody, earned early release time, furlough, home detention, partial confinement, work crew, work release, or any other form of early release as defined under RCW 9.94A.150 (1), (2), (3),

(5), (7), or (8), or any other form of authorized leave of absentce from the correctional facility while not in the direct custody of a corrections officer or officers during such minimum terms of total confinement except in the case of an offender in need of emergency medical treatment or for the purpose of commitment to an inpatient treatment facility in the case of an offender convicted of the crime of rape in the first degree.

(5) In sentencing a first-time offender the court may waive the imposition of a sentence within the sentence range and impose a sentence which may include up to ninety days of confinement in a facility operated or utilized under contract by the county and a requirement that the offender refrain from committing new offenses. The sentence may also include up to two years of community supervision, which, in addition to crime-related prohibitions, may include requirements that the offender perform any one or more of the following:

(a) Devote time to a specific employment or occupation;

(b) Undergo available outpatient treatment for up to two years, or inpatient treatment not to exceed the standard range of confinement for that offense;

(c) Pursue a prescribed, secular course of study or vocational training;

(d) Remain within prescribed geographical boundaries and notify the court or the community corrections officer prior to any change in the offender's address or employment;

(e) Report as directed to the court and a community corrections officer; or

(f) Pay all court-ordered legal financial obligations as provided in RCW 9.94A.030 and/or perform community service work.

(6)(a) An offender is eligible for the special drug offender sentencing alternative if:

(i) The, offender is convicted of the manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance classified in Schedule I or II that is a narcotic drug or a felony that is, under chapter 9A.28 RCW or RCW 69.50.407, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes, and the violation does not involve a sentence enhancement under RCW 9.94A.310 (3) or (4);

(ii) The offender has no prior convictions for a felony in this state, another state, or the United States; and

(iii) The offense involved only a small quantity of the particular controlled substance as determined by the judge upon consideration of such factors as the weight, purity, packaging, sale price, and street value of the controlled substance.

(b) If the midpoint of the standard range is greater than one year and the sentencing judge determines that the offender is eligible for this option and that the offender and the community will benefit from the use of the special drug offender sentencing alternative, the judge may waive imposition of a sentence within the standard range and impose a sentence that must include a period of total confinement in a state facility for one-half of the midpoint of the standard range. During incarceration in the state facility, offenders sentenced under this subsection shall undergo a comprehensive substance abuse assessment and receive, within available resources, treatment services appropriate for

the offender. The treatment services shall be designed by the division of alcohol and substance abuse of the department of social and health services, in cooperation with the department of corrections. If the midpoint of the standard range is twenty-four months or less, no more than three months of the sentence may be served in a work release status. The court shall also impose one year of concurrent community custody and community supervision that must include appropriate outpatient substance abuse treatment, crime-related prohibitions including a condition not to use illegal controlled substances, and a requirement to submit to urinalysis or other testing to monitor that status. The court may require that the monitoring for controlled substances be conducted by the department or by a treatment alternatives to street crime program or a comparable court or agency-referred program. The offender may be required to pay thirty dollars per month while on community custody to offset the cost of monitoring. In addition, the court shall impose three or more of the following conditions:

(i) Devote time to a specific employment or training;

(ii) Remain within prescribed geographical boundaries and notify the court or the community corrections officer before any change in the offender's address or employment;

(iii) Report as directed to a community corrections officer;

(iv) Pay all court-ordered legal financial obligations;

(v) Perform community service work;

(vi) Stay out of areas designated by the sentencing judge.

(c) If the offender violates any of the sentence conditions in (b) of this subsection, the department shall impose sanctions administratively, with notice to the prosecuting attorney and the sentencing court. Upon motion of the court or the prosecuting attorney, a violation hearing shall be held by the court. If the court finds that conditions have been willfully violated, the court may impose confinement consisting of up to the remaining one-half of the midpoint of the standard range. All total confinement served during the period of community custody shall be credited to the offender, regardless of whether the total confinement is served as a result of the original sentence, as a result of a sanction imposed by the department, or as a result of a violation found by the court. The term of community supervision shall be tolled by any period of time served in total confinement as a result of a violation found by the court.

(d) The department shall determine the rules for calculating the value of a day fine based on the offender's income and reasonable obligations which the offender has for the support of the offender and any dependents. These rules shall be developed in consultation with the administrator for the courts, the office of financial management, and the commission.

(7) If a sentence range has not been established for the defendant's crime, the court shall impose a determinate sentence which may include not more than one year of confinement, community service work, a term of community supervision not to exceed one year, and/or other legal financial obligations. The court may impose a sentence which provides more than one year of confinement if the court finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

(8) When an offender is convicted of a sex offense …

* * *

(14) Except as provided under 9.94A.140(1) and 9.94A.142(1), a court may not impose a sentence providing for a term of confinement or community supervision or community placement which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.

* * *

9.94A.125. Deadly weapon special verdict-Definition.

In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.

For purposes of this section, a deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

* * *

9.94A.310. Table 1 – Sentencing grid

Sentencing Grid

SERIOUSNESS LEVEL	OFFENDER SCORE									
	0	1	2	3	4	5	6	7	8	9 or more
XVI	Life Sentence without Parole/Death Penalty									
XV	23y4m 240- 320	24y4m 250- 333	25y4m 261- 347	26y4m 271- 361	27y4m 281- 374	28y4m 291- 388	30y4m 312- 416	32y10m 338- 450	36y 370- 493	40y 411- 548
XIV	14y4m 123- 220	15y4m 134- 234	16y2m 144- 244	17y 154- 254	17y11m 165- 265	18y9m 175- 275	20y5m 195- 295	22y2m 216- 316	25y7m 257- 357	29y 298- 397
XIII	12y 123- 164	13y 134- 178	14y 144- 192	15y 154- 205	16y 165- 219	17y 175- 233	19y 195- 260	21y 216- 288	25y 257- 342	29y 298- 397
XII	9y 93- 123	9y11m 102- 136	10y9m 111- 147	11y8m 120- 160	12y6m 129- 171	13y5m 138- 184	15y9m 162- 216	17y3m 178- 236	20y3m 209- 277	23y3m 240- 318
XI	7y6m 78- 102	8y4m 86- 114	9y2m 95- 125	9y11m 102- 136	10y9m 111- 147	11y7m 120- 158	14y2m 146- 194	15y5m 159- 211	17y11m 185- 245	20y5m 210- 280
X	5y 51- 68	5y6m 57- 75	6y 62- 82	6y6m 67- 89	7y 72- 96	7y6m 77- 102	9y6m 98- 130	10y6m 108- 144	12y6m 129- 171	14y6m 149- 198
IX	3y 31- 41	3y6m 36- 48	4y 41- 54	4y6m 46- 61	5y 51- 68	5y6m 57- 75	7y6m 77- 102	8y6m 87- 116	10y6m 108- 144	12y6m 129- 171
VIII	2y 21- 27	2y6m 26- 34	3y 31- 41	3y6m 36- 48	4y 41- 54	4y6m 46- 61	6y6m 67- 89	7y6m 77- 102	8y6m 87- 116	10y6m 108- 144
VII	18m 15- 20	2y 21- 27	2y6m 26- 34	3y 31- 41	3y6m 36- 48	4y 41- 54	5y6m 57- 75	6y6m 67- 89	7y6m 77- 102	8y6m 87- 116
VI	13m 12+ 14	18m 15- 20	2y 21- 27	2y6m 26- 34	3y 31- 41	3y6m 36- 48	4y6m 46- 61	5y6m 57- 75	6y6m 67- 89	7y6m 77- 102
V	9m 6- 12	13m 12+ 14	15m 13- 17	18m 15- 20	2y2m 22- 29	3y2m 33- 43	4y 41- 54	5y 51- 68	6y 62- 82	7y 72- 96
IV	6m 3- 9	9m 6- 12	13m 12+ 14	15m 13- 17	18m 15- 20	2y2m 22- 29	3y2m 33- 43	4y2m 43- 57	5y2m 53- 70	6y2m 63- 84
III	2m 1- 3	5m 3- 8	8m 4- 12	11m 9- 12	14m 12+ 16	20m 17- 22	2y2m 22- 29	3y2m 33- 43	4y2m 43- 57	5y 51- 68
II	0-90 Days	4m 2- 6	6m 3- 9	8m 4- 12	13m 12+ 14	16m 14- 18	20m 17- 22	2y2m 22- 29	3y2m 33- 43	4y2m 43- 57
I	0-60 Days	0-90 Days	3m 2- 5	4m 2- 6	5m 3- 8	8m 4- 12	13m 12+ 14	16m 14- 18	20m 17- 22	2y2m 22- 29

NOTE: Numbers in the first horizontal row of each seriousness category represent sentencing midpoints in years(y) and months(m). Numbers in the second and third rows represent presumptive sentencing ranges in months, or in days if so designated. 12+ equals one year and one day.

BEST AVAILABLE COPY

* * *

9.94A.350. Offense seriousness level

The offense seriousness level is determined by the offense of conviction.

9.94A.360. Offender score

The offender score is measured on the horizontal axis of the sentencing grid. . . .

9.94A.370. Presumptive sentence

(1) The intersection of the column defined by the offender score and the row defined by the offense seriousness score determines the presumptive sentencing range (see RCW 9.94A.310, (Table 1)). The additional time for deadly weapon findings or for those offenses enumerated in RCW 9.94A.310(4) that were committed in a state correctional facility or county jail shall be added to the entire presumptive sentence range. The court may impose any sentence within the range that it deems appropriate. All presumptive sentence ranges are expressed in terms of total confinement.

(2) In determining any sentence, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. Acknowledgement includes not objecting to information stated in the presentence reports. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence. Facts that establish the elements of a more serious crime or additional crimes may not be used to go outside the presumptive sentence range except upon stipulation or when specifically provided for in *RCW 9.94A.390(2) (c), (d), (f), and (g).

* * *

9.94A.390. Departures from the guidelines

If the sentencing court finds that an exceptional sentence outside the standard range should be imposed in accordance with RCW 9.94A.120(2), the sentence is subject to review only as provided for in RCW 9.94A.210(4).

The following are illustrative factors which the court may consider in the exercise of its discretion to impose an exceptional sentence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(1) Mitigating Circumstances

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law, was significantly impaired (voluntary use of drugs or alcohol is excluded).

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The operation of the multiple offense policy of RCW 9.94A.400 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(2) Aggravating Circumstances

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance due to extreme youth, advanced age, disability, or ill health.

(c) The current offense was a violent offense, and the: defendant knew that the victim of the current offense was pregnant.

(d) The current offense was a major economic offense, or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including

positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

(f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A. 127.

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(h) The current offense involved domestic violence, as defined in RCW 10.99.020 and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(i) The operation of the multiple offense policy of RCW 9.94A.400 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(j) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter as expressed in RCW 9.94A.010.

(k) The offense resulted in the pregnancy of a child victim of rape.

* * *

9.94A.420. Presumptive ranges that exceed the statutory maximum

If the presumptive sentence duration given in the sentencing grid exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence.

* * *

Chapter 9A.20

Classification of Crimes

9A.20.021. Maximum sentences for crimes committed July 1, 1984 and after

(1) Felony. No person convicted of a classified felony shall be punished by confinement or fine exceeding the following:

(a) For a class A felony, by confinement in a state correctional institution for a term of life imprisonment, or by a fine an amount fixed by the court of fifty thousand dollars, or by both such confinement and fine;

(b) For a class B felony, by confinement in a state correctional institution for a term of ten years, or by a fine in an amount fixed by the court of twenty thousand dollars, or by both such confinement and fine.

(c) For a class C felony, by confinement in a state correctional institution for five years, or by a fine in an

amount fixed by the court of ten thousand dollars, or by both such confinement and fine.

(2) Gross misdemeanor. Every person convicted of a gross misdemeanor defined in Title 91 RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than one year, or by a fine in an amount fixed by the court of not more than five thousand dollars, or by both such imprisonment and fine.

(3) Misdemeanor. Every person convicted of a misdemeanor defined in Title 9A RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than ninety days, or by a fine in an amount fixed by the court of not more than one thousand dollars, or by both such imprisonment and fine.

(4) This section applies to only those crimes committed on or after July 1, 1984.

* * *

Washington Criminal Code

Chapter 9A.40

9A.40.020 Kidnapping in the first degree

(1) A person is guilty of kidnapping in the first degree who intentionally abducts another person with intent:

(a) To hold him for ransom or reward, or as a shield or hostage; or

(b) To facilitate commission of any felony or flight thereafter; or

(c) To inflict bodily injury on him; or

(d) To inflict extreme mental distress on him or a third person; or

(e) To interfere with the performance of any governmental function.

(2) Kidnapping in the first degree is a class A felony.

9A.40.030. Kidnapping in the second degree

(1) A person is guilty of kidnapping in the second degree if he intentionally abducts another person under circumstances not amounting to kidnapping in the first degree.

(2) In any prosecution for kidnapping in the second degree, it is a defense if established by a preponderance of the evidence that (a) the abduction does not include the use of or intent to use or threat to use deadly force, and (b) the actor is a relative of the person abducted, and (c) the actor's sole intent to assume custody of that person. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, any other crime.

(3) Kidnapping in the second degree is a class B felony.

* * *

Chapter 10.99

Domestic Violence – Official Response

10.99.010. Purpose-Intent. The purpose of this chapter is to recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide.

The legislature finds that the existing criminal statutes are adequate to provide protection for victims of domestic violence. However, previous societal attitudes have been reflected in policies and practices which have resulted in differing treatment of crimes occurring between cohabitants and of the same crimes occurring between strangers. Only recently has public perception of the serious consequences of domestic violence to society and to the victims led to the recognition of the necessity for early intervention by law enforcement agencies. It is the intent of the legislature that the official response to cases of domestic violence shall stress the enforcement of the laws to protect the victim and shall communicate the attitude that violent behavior is not excused or tolerated. Furthermore, it is the intent of the legislature that criminal laws be enforced without regard to whether the persons involved are or were married, cohabitating, or involved in a relationship.

* * *

10.99.020 Definitions. . . .

(3) "Domestic violence" includes but is not limited to any of the following crimes when committed by one member of a family or household against another:

(p) Kidnapping in the second degree (RCW 9A.40.020);

* * *

10.99.040 Duties of court – No-contact order.

(1) Because of the serious nature of domestic violence, the court in domestic violence actions:

(2)(a) Because of the likelihood of repeated violence directed at those who have been victims of domestic violence

in the past, when any person charged with or arrested for a crime involving domestic violence is released from custody before arraignment or trial on bail or personal recognizance, the court authorizing the release may prohibit that person from having any contact with the victim. The jurisdiction authorizing the release shall determine whether that person should be prohibited from having any contact with the victim, the court authorizing release may issue, by telephone, a no-contact order prohibiting the person charged or arrested from having contact with the victim or from knowingly coming within, or knowingly remaining within, a specified distance of a location.

72785-6

SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

R. HOWARD BLAKELY, II,

Appellant

PETITION FOR REVIEW BY THE SUPREME

COURT OF THE STATE OF WASHINGTON

Douglas D. Phelps
Attorney for Appellant

WSBA #22620
PHELPS AND ASSOCIATES
N. 2903 Stout Road
Spokane, WA 99206
(509) 892-0467

* * *

7. The State supreme court should grant review based on the courts decision in *State v. Blakely* where the court held: "that *Apprendi* does not apply to factual determinations that support reasons for exceptional sentences upward. *Gore* held that Washington's statutory scheme permits a judge to impose an exceptional sentence within the maximum range determined by the Legislature. *State v. Gore*, 143 Wn.2d 288, 314, 21 P.3d 262 (2001). Because the statutory and nonstatutory aggravating factors neither increase the maximum sentence nor define separate offenses calling for separate penalties, the *Apprendi* rule is not triggered. *Id.* at 313-314. Consequently, the facts supporting the exceptional sentence here did not have to be submitted to a jury or proved beyond a reasonable doubt. *Id.* at 315; *see also State v. Hopkins*, 109 Wn. App. 558, 569, 36 P.3d 1080 (2001)."

This position is contrary to the position of the court in *Apprendi* where the U.S. Supreme Court held that, "if the court found by a preponderance of the evidence, 'the defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.'" *Apprendi v. New Jersey*, 530 U.S. 466, 490,120 S.Ct. 2348, 147 L. Ed. 2d 435 (2000). The *Apprendi* court further held that the increase in the statutory maximum penalty violated Apprendi's constitutional rights to due process and a jury trial because it "removed from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Id.* at 490.

(3)

Supreme Court, U.S.
FILED
SEP 11 2003
OFFICE OF THE CLERK

No. 02-1632

In The

Supreme Court of the United States

RALPH HOWARD BLAKELY, JR.,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

On Petition For A Writ Of Certiorari To The Washington Court Of Appeals, Division III

RESPONDENT'S BRIEF IN OPPOSITION

JOHN D. KNODELL
(*Counsel of Record*)
Prosecuting Attorney
P.O. Box 37
Ephrata, Washington 98823
(509) 754-2011

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

29 pp

QUESTIONS PRESENTED FOR REVIEW (RESTATED)

Whether the statutory maximum sentence authorized by guilty plea or verdict is that set forth in WASH. REV. CODE § 9A.20.021 (2002) as interpreted by the Washington Supreme Court in *State v. Gore*, 143 Wash.2d 288, 311-15, 21 P.3d 262 (2001), such that sentencing "within [this] authorized range does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendment" as set forth in *Harris v. United States*, 536 U.S. 545, 558, 122 S.Ct. 2406, 2415, 153 L.Ed.2d 524 (2002)?

Whether the factors set forth in WASH. REV. CODE § 9.94A.535 (2002) and upon which the trial court relied in imposing an exceptional sentence are properly sentencing factors to be found by a judge or offense elements to be found by the jury? *Harris v. United States*, 536 U.S. 545, 557-68, 122 S.Ct. 2406, 2414-20, 153 L.Ed.2d 524 (2002).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
CITATION TO OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE AND FACTS	1
A. Facts	1
B. Procedural History	4
REASONS FOR DENYING THE WRIT (ARGUMENT)	6
A. The Washington State Supreme Court's Determination that the High End of a Sentencing Guideline Is not the Statutory Maximum Sentence Is Binding on this Court	7
B. The Sentencing Reform Act Channels Judicial Discretion for Typical (Standard Range) and Atypical (Exceptional) Offenses	8
C. Washington Courts Follow this Court's Precedent	11
D. Federalism Permits a Conflict of Laws	14
E. Jury Findings are Unlikely to Alter this Sentence	16
F. The Extension of *Apprendi* Proposed by the Petitioner Is Contrary to Public Policy	20
CONCLUSION	23

TABLE OF AUTHORITIES

Page

STATE CASES

State v. Barnes, 117 Wash.2d 701, 818 P.2d 1088 (1991) 9

State v. Blakely, 148 Wash.2d 1010, 62 P.3d 889 (2003) 1

State v. Blakely, 111 Wash. App. 851, 47 P.2d 149 (2002) ..... *passim*

State v. Gore, 143 Wash.2d 288, 21 P.3d 262 (2001) 6, 7, 8, 11, 14

State v. Gould, 271 Kan. 394, 23 P.3d 801 (2001) 15

State v. Flores-Moreno, 72 Wash. App. 733, 866 P.2d 648 (1994) 10

State v. Xaviar, 117 Wash. App. 196, 69 P.3d 901 (2003) 10

9TH CIRCUIT CASE

United States v. Montalvo, 331 F.3d 1052 (9th Cir. 2003) 21

UNITED STATES SUPREME COURT CASES

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) ..... *passim*

Buchanan v. Washington, __ U.S. __, 123 S.Ct. 1266, 154 L.Ed.2d 1036, 71 U.S.L.W. 3548 (2003) 12

Castillo v. United States, 530 U.S. 120, 120 S.Ct. 2090, 147 L.Ed.2d 94 (2000) 13

Harris v. United States, 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) 11, 12, 13

TABLE OF AUTHORITIES – Continued

Page

McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986) 11, 12, 14

Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) 8, 15

Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed.2d (1948) 15

STATUTES AND RULES

Kan. Stat. Ann. § 21-5401 (2003) 15

S. Ct. R. 15(2) 1

28 U.S.C. § 1257(a) 1

U.S. Const. amend. V 11, 12

U.S. Const. amend. VI 1, 11, 12

U.S. Const. amend. X 15

U.S. Const. amend. XIV 1

WASH. REV. CODE § 9.94A.010 (2002) 5, 8, 9, 10

WASH. REV. CODE § 9.94A.500 (2002) 21

WASH. REV. CODE § 9.94A.505 (2002) 5, 7

WASH. REV. CODE § 9.94A.535 (2002) ..... *passim*

WASH. REV. CODE § 9.94A.585 (2002) 10, 22

WASH. REV. CODE § 9.94A.712 (2002) 8

WASH. REV. CODE § 9A.20 (2002) 7, 8

WASH. REV. CODE § 9A.20.010 (2002) 6

WASH. REV. CODE § 9A.20.021 (2002) ..... *passim*

WASH. REV. CODE § 9A.36.021 (2002) 13

TABLE OF AUTHORITIES – Continued

Page

WASH. REV. CODE § 9A.40.030 (2002) 5, 13

WASH. REV. CODE § 9A.44.045 (2002) 9

SECONDARY SOURCES

Seth A. Fine & Douglas J. Ende, *Washington Practice* Vol. 13B (2d ed.1998) 9, 10

David E. Rovella, *A Looming 'Apprendi' Tsunami?*, NAT'L L. J. (January 2, 2001) 20, 22

Lisa K. Strom, *Exceptional Sentencing in Washington After State v. Freitag: Pushing the Limits of the Sentencing Reform Act*, 70 WASH. L. REV. 563 (1995) 8, 9

The Supreme Court, 2001 Term, Leading Cases, 116 HARV. L. REV. 200 (2002) 12

CITATION TO OPINION BELOW

The opinion of the Washington Court of Appeals is reported as *State v. Blakely*, 111 Wash. App. 851, 47 P.2d 149 (2002). The order of the Washington Supreme Court denying discretionary review of that decision is reported as *State v. Blakely*, 148 Wash.2d 1010, 62 P.3d 889 (2003).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a), except as argued herein.

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner contends that the issues presented in this case involve the Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE AND FACTS

A. FACTS[1]

In July 1995, the Petitioner Ralph Howard Blakely broke into the Spokane, Washington home of his estranged wife Yolanda. VRP (Verbatim Report of Proceedings) 607-08. He held her by the wrists, twisting them tightly, and

[1] While this Court's review regards purely legal issues, the Respondent presents the facts of the crime pursuant to S. Ct. R. 15(2) in order to address the errors and mischaracterizations in the petition.

threatened to poison her and the children with cyanide or, alternately, to kidnap the children. VRP 607-08. Soon after that incident, Mrs. Blakely obtained a restraining order against her husband and filed for divorce. VRP 601, 609-11.

While going through divorce and trust litigation, Petitioner Howard Ralph Blakely built a coffin-like box at his home in Montana, tailored to his wife's size. CP (Clerk's Papers) 5, VRP 641-44. On October 26, 1998, he drove to his wife's farm in Grant County, Washington in violation of restraining orders. VRP 607-15. He found her at the mailbox, knocked her to the ground, knelt on her chest, and bound her with duct tape so tightly that her wrists turned blue. VRP 631. Mr. Blakely covered his tracks in the gravel before carrying his bound wife through the orchard. VRP 632-35, 735. He dropped her on her shoulder, and then forced her to walk to his pickup truck. VRP 632-41. Reciting the knives, guns, and ammunition in his possession, Mr. Blakely threatened to kill his wife and himself. VRP 640-41. He also threatened to hire someone to kill Yolanda and Ralphy if she did not drop the trust litigation. VRP 640. Holding a knife to her, Mr. Blakely forced his wife to climb over the tailgate of his pickup, under the canopy, and into the homemade coffin, which he then latched shut. VRP 641-46. The coffin's length was only three inches longer than Mrs. Blakely's standing height. VRP 641-44. After driving through the orchard to the house, Mr. Blakely opened the coffin, held the knife to his wife's throat, and demanded she reveal the location of her financial documents and computer. VRP 646-49.

When thirteen year old Ralphy returned from school, his mother vainly tried to warn him away by banging on the box and yelling. VRP 650-51, 859. Mr. Blakely surprised

Ralphy, stepping out from behind a tree and threatening his son with a filet knife. VRP 857-58. Mr. Blakely warned his son that he was desperate, that Yolanda was in great danger, and that Ralphy should not give his father any trouble. Id. Ralphy and Yolanda spoke to each other through the walls of the coffin. VRP 859-60. While collecting his things, Ralphy looked for a gun to rescue his mother, but could not find one. VRP 861-62. Mr. Blakely ordered his young son to follow the pickup in his mother's car and threatened to kill Yolanda by blowing a hole through the coffin with a shotgun if Ralphy "tried anything." VRP 862.

Ralphy tried to get help at a gas station. VRP 869. He managed to escape, but Mr. Blakely drove off eluding police through three states, with Yolanda trapped in the coffin. VRP 869-71. Mr. Blakely did not check on her welfare to see if she was able to breathe. VRP 673-74. While Mr. Blakely sat in a heated cab, he had to be reminded that his wife was cold while she lay trapped in a coffin in the pickup bed in the middle of a cold autumn night. VRP 721-22. When Mr. Blakely released his wife from the coffin-like box after four-plus hours, he would not untie her hands so she could pull down her pants to relieve herself. VRP 659. Once in the cab, Yolanda was trapped in a corner of the seat between boxes with her legs curled up despite varicose veins. VRP 660-61. Mr. Blakely kept the knife next to the steering wheel as a constant threat. VRP 660. Although Mr. Blakely kidnaped his wife in the afternoon and drove with her through the night and into the next morning, throughout the whole ordeal he provided her with only half of a banana. VRP 723. At various times, he put his wife back in the coffin while he refueled, changed a tire, and made a telephone call. VRP 665-69.

Once they arrived in Montana, Mr. Blakely hid from police at his neighbor Mary Gillespie's house. VRP 670-72. There he demanded his wife sign over her property and litigation rights, and he engaged in business over the phone with his stockbroker.[2] VRP 679-83. He made frequent phone calls to his live-in girlfriend of two and a half years, Ilse Barros. VRP 678. He secreted his wife's most important financial files at Ms. Gillespie's house (which were discovered two months later during a home renovation). VRP 688. Eventually Ms. Gillespie escaped the house and alerted police. VRP 676. Federal agents arrested Mr. Blakely on October 27, 1998. VRP 684.

B. PROCEDURAL HISTORY

On October 27, 1998, the Petitioner Howard Ralph Blakely was charged with the first degree kidnapings of his wife Yolanda Blakely and thirteen year old son Ralphy Blakely. CP 1-6.

---

[2] Please note the Petitioner characterizes the crimes as an attempt to reunite the family. Petition at 4. A single physician (not three) reported that Mr. Blakely (not any physician) had excused his crimes in this way. VRP 756. In a different version, Mr. Blakely accused his wife of inviting him to violate the restraining order and of poisoning him upon his arrival at the orchard such that he has no memory of events. VRP 1045. The victim's account of Mr. Blakely's deliberate thought process throughout the ordeal and the premeditated fashion in which he handbuilt a coffin to his wife's measurements contradict this story. The trial judge did not subscribe to the reunion explanation. VRP 1051-53. " . . . Mr. Blakely was not trying as a principal goal to reunite his family . . . His first overtures were you've got to terminate the trust litigation." VRP 1052-53.

After multiple and lengthy evaluations at Eastern State Hospital, doctors determined that while Mr. Blakely had been diagnosed at various times as schizophrenic, he only sought psychiatric treatment when embroiled in legal issues. VRP 242, CP 70. In fact, the doctors determined Mr. Blakely was malingering and had never been a paranoid schizophrenic. VRP 214, 244-45, 250-62; CP 70. Ultimately he was diagnosed as a narcissist. VRP 261, CP 70. In April 2000, Mr. Blakely received a jury trial on the issue of competency. The jury found him competent and Mr. Blakely proceeded to trial. VRP 345-48.

After a jury had been selected, Mr. Blakely requested the court accept a change of plea and dismiss the jury. VRP 515-27, VRP July 31, 2000 at 15. On July, 2000, Mr. Blakely pled guilty to one count of second degree domestic violence kidnaping of his wife with a deadly weapon enhancement and one count of second degree domestic violence assault of his son. CP 494-502. After a three day sentencing hearing, the trial court imposed an exceptional sentence of 90 months (i.e., 7½ years) on the kidnaping charge to run concurrent with a standard sentence of 14 months on the assault charge. VRP 566-1054, CP 608-633. Washington state law provides for maximum sentences as well as standard ranges. WASH. REV. CODE § 9A.20.010 (2002); WASH. REV. CODE § 9A.20.021 (2002); WASH. REV. CODE § 9.94A.505-35 (2002). Second degree kidnaping without a finding of sexual motivation is a class B felony. WASH. REV. CODE § 9A.40.030(3) (2002). The maximum sentence for a class B felony is ten years. WASH. REV. CODE § 9A.20.021(b) (2002).

The court's exceptional sentence was based on Mr. Blakely's deliberate cruelty in "repeatedly and protractedly confining his victim in a coffin-like box" and on the

fact that the crime occurred "within sight and sound of the victim's and defendant's minor child." CP 608-633, VRP 1047-53. See WASH. REV. CODE §§ 9.94A.535(2)(a) and (h)(ii) (2002).

On direct appeal, Mr. Blakely argued the exceptional sentence violated the holdings of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct 2348, 147 L.Ed.2d 435 (2000). The Court of Appeals affirmed the sentence on the single aggravating circumstance of commission within sight or sound of a minor child. *State v. Blakely*, 111 Wash. App. 851, 869-70, 47 P.2d 149, 158-59 (2002). The court noted that the Washington Supreme Court has held that an exceptional sentence above the standard range but below the legislative maximum does not implicate *Apprendi* and does not require a jury trial to determine sentencing factors beyond reasonable doubt. *State v. Gore*, 143 Wash.2d 288, 311-15, 21 P.3d 262 (2001). The Washington Supreme Court denied review.

The Petitioner has requested this Court's review, claiming a conflict between the states.

REASONS FOR DENYING THE WRIT (ARGUMENT)

In *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-63, 147 L.Ed.2d 435 (2000), this Court held that a fact which increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proven beyond reasonable doubt. While adopting the same language, the Petitioner argues that the maximum sentence prescribed by the Washington State legislature is the upper limit of the standard range, or 53 months

in his case. Petition at 11. While the Petitioner avers his claim is "indisputable," the argument has been repudiated by the ultimate espositor of Washington law in *State v. Gore*, 143 Wash.2d 288, 21 P.3d 262, 277 (2001). The Petitioner's proposed extension of the *Apprendi* principle undermines the intent of the legislature, the value of sentencing ranges and guidelines, and the authority of the state courts in interpreting state law.

A. THE WASHINGTON STATE SUPREME COURT'S DETERMINATION THAT THE HIGH END OF A SENTENCING GUIDELINE IS NOT THE STATUTORY MAXIMUM SENTENCE IS BINDING ON THIS COURT.

Mr. Blakely pled guilty to two class B felonies. The legislative maximum sentence for a class B felony is ten years.[3] WASH. REV. CODE § 9A.20.021(1)(b). The trial court told Mr. Blakely that he could receive a statutory maximum sentence. CP 495; *State v. Gore*, 143 Wash.2d 288, 315, 21 P.3d 262, 277 (2001).

The Petitioner argues that this Court should extend *Apprendi* to treat the upper limit of the sentencing guidelines as the legislative maximum sentence. However, such an interpretation is clearly contrary to legislative intent. WASH. REV. CODE § 9.94A.505(5) (2002) (directing that the statutory maximum is provided in WASH. REV. CODE § 9A.20); WASH. REV. CODE § 9.94A.535 (2002) ("An exceptional sentence

[3] In stark contrast to amici's alarmist argument, the Washington legislature has not enacted a statute that results in maximum sentences of life for all non-capital felonies. The maximum sentence in this case was ten years, a meaningful upper limit for class B felonies.

imposed on an offender sentenced under RCW 9.94A.712 shall be to a minimum term set by the court and a maximum term equal to the statutory maximum sentence for the offense of conviction under chapter 9A.20 RCW."); WASH. REV. CODE § 9A.20.021 (2002) (providing the maximums). The Sentencing Reform Act (SRA) allows for exceptional sentences, delineating detailed guidelines. These maximums have existed for decades. Accordingly, they cannot fairly be characterized as an avoidance or subterfuge of the *Apprendi* ruling through labeling. See Petition at 13. The statute declares the purpose of the SRA is *not* to eliminate the court's discretion. WASH. REV. CODE § 9.94A.010 (2002).

The Washington Supreme Court has recognized that WASH. REV. CODE § 9A.20.021 provides the legislative maximums. *State v. Gore*, 143 Wash.2d at 315, 21 P.3d at 277. The state supreme court's construction of state law is authoritative. *Mullaney v. Wilbur*, 421 U.S. 684, 691, 95 S.Ct. 1881, 1886, 44 L.Ed.2d 508 (1975). This court definitively determines what is the "prescribed statutory maximum." *Apprendi*, 530 U.S. at 490, 120 S.Ct. at 2363.

B. THE SENTENCING REFORM ACT CHANNELS JUDICIAL DISCRETION FOR TYPICAL (STANDARD RANGE) AND ATYPICAL (EXCEPTIONAL) OFFENSES.

The Sentencing Reform Act or SRA enacted in 1981 created sentencing grids or matrices to standardize sentences and decrease sentence disparity throughout the state. Lisa K. Strom, *Exceptional Sentencing in Washington After State v. Freitag: Pushing the Limits of the Sentencing Reform Act*, 70 WASH. L. REV. 563, 564 (1995).

Before the SRA was enacted, sentencing courts and the parole board essentially had unbridled discretion in setting the length of the sentences. Seth A. Fine & Douglas J. Ende, *Washington Practice* Vol. 13B, § 3402-03 (2d ed.1998). Judges tended to sentence every defendant convicted of a felony to the statutory maximum. 70 WASH. L. REV. at 565. However, this was a maximum only. After a minimum term was served, the parole board or other penal authority could reduce or terminate the sentence in consideration of proof of rehabilitation. Id. Thus, for the crime of first degree rape, a defendant could receive any where from three years to life. WASH. REV. CODE § 9A.44.045 (2002). This system lacked public accountability, lacked predictability, and was subjective – based on the prisoner's personal characteristics rather than the facts of the particular crime. 70 WASH. L. REV. at 565. "In one case, a robber might receive probation; in the next, a shoplifter might go to prison. There was also the danger that sentences could reflect the judge's unconscious racial or gender biases." *Washington Practice* Vol. 13B, § 3404.

With the SRA, for the first time the defendant could make a meaningful prediction about his or her sentence. *Washington Practice* Vol. 13B, § 3401. It changed the focus of sentencing from "rehabilitation to proportionality, equality, and justice." *State v. Barnes*, 117 Wash.2d 701, 710, 818 P.2d 1088, 1092 (1991). When sentences are proportionate to the crime and equal from offender to offender, they promote respect for the law by doling out just desserts. WASH. REV. CODE § 9.94A.010 (2002). Beyond sentencing, the SRA had a profound impact on plea negotiations and trial strategy. *Washington Practice* Vol. 13B, § 3401.

A Washington court is now bound to the sentencing grids with five exceptions. *Washington Practice* Vol. 13B, § 3405 (Supp. 2003). One of these exceptions, pertinent to the instant matter, is that the court may order an exceptional sentence up or down for "substantial and compelling reasons." WASH. REV. CODE § 9.94A.535 (2002). Because no two crimes or criminals are alike, and because not all aspects of a crime can be accurately reflected in a numerical score, the flexibility provided by an exceptional sentence is proper. Such a sentence must be supported by written findings and conclusions and, unlike a standard range sentence, is appealable. Id. The statute permits the court's discretion so long as the sentence does not go above the statutory maximum or is "clearly excessive" or "clearly too lenient." WASH. REV. CODE §§ 9A.20.021 and 9.94A.585(4) (2002).

Rather than serving as a statutory limit on the judge's sentencing authority, the purpose of the standard range is to provide some uniformity in sentencing for those who commit a "typical" offense. *State v. Xaviar*, 117 Wash. App. 196, 206, 69 P.3d 901, 906 (2003); *State v. Flores-Moreno*, 72 Wash. App. 733, 744-45, 866 P.2d 648, 654 (1994). The SRA "structures, but does not eliminate, discretionary decisions affecting sentences," ensuring that the punishment is commensurate with the crime and with similarly situated offenders.[4] WASH. REV. CODE § 9.94A.010 (2002).

---

[4] The policy of the SRA is consistent with the mission statement of amicus curiae Families Against Mandatory Minimums, which advocates that "the punishment should fit the crime and culpability of the offender." The details of Mr. Blakely's crime are neither "typical" nor deserving of a standard range sentence.

The development of the SRA is not dissimilar from sentencing reform throughout the country. Sentencing has moved from fixed terms, to judicial discretion within a permissible range, to standards which channeled the judge's discretion within and without of the range. *Harris v. United States*, 536 U.S. 545, 558, 122 S.Ct. 2406, 2414-15, 153 L.Ed.2d 524 (2002). "The Court has recognized that this process is constitutional – and that the facts taken into consideration need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt. . . . Judicial factfinding within the course of selecting a sentence within the authorized range does not implicate the indictment, jury trial, and reasonable-doubt components of the Fifth and Sixth Amendment." *Id.*

C. WASHINGTON COURTS FOLLOW THIS COURT'S PRECEDENT.

In *State v. Gore*, the Washington Supreme Court relied significantly on *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986). *State v. Gore*, 143 Wash.2d at 312, 21 P.3d at 276. In *McMillan*, this Court held that "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." *McMillan*, 477 U.S. at 93, 106 S. Ct. at 2420. Law that "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty" but "operates solely to limit the sentencing court's discretion within the range already available to it" withstands an *Apprendi* challenge. *McMillan*, 477 U.S. at 87-88, 106 S.Ct. at 2417. *Apprendi* did not overrule *McMillan*. *Harris*, 536 U.S. at 557-68, 122 S.Ct. at 2414-20.

On February 4, 2003, this Court denied certiorari on this identical issue and argument. *Buchanan v. Washington*, __ U.S. __, 123 S.Ct. 1266, 154 L.Ed.2d 1036, 71 U.S.L.W. 3548 (2003). The State's brief in the Buchanan matter relied heavily on *Harris v. United States*, 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) and *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986).

In *Harris v. United States*, the Supreme Court indicated that it "prefers to avoid a broad interpretation of [the *Apprendi*] decision." *The Supreme Court, 2001 Term, Leading Cases*, 116 HARV. L. REV. 200, 230, 238 (2002). Upholding *McMillan v. Pennsylvania*, the *Harris* Court explained that prosecutors must prove to a jury beyond reasonable doubt *only those elements that the authors of the Bill of Rights would have considered to be elements of a separate crime*. *Harris v. United States*, 536 U.S. at 557, 122 S.Ct. at 2414. On the other hand, sentencing factors "have been the traditional domain of judges; they have not been alleged in the indictment or proved beyond a reasonable doubt. There is no reason to believe that those who framed the Fifth and Sixth Amendments would have thought of them as the elements of the crime." *Harris v. United States*, 536 U.S. at 560, 122 S.Ct. at 2416.

The clear question for any court in applying the ruling of *Apprendi* is given in *Harris*. Is the reason for the enhanced sentence due to an offense element or a sentencing factor? In *Harris v. United States*, this Court held that "not all facts affecting the defendant's punishment are elements." *Harris*, 536 U.S. at 549, 122 S.Ct. at 2410. The *Harris* analysis looks to the structure of the statute to determine whether the enhancement looks more like a

typical element of the crime or a traditional sentencing factor. *Harris*, 536 U.S. 552, 122 S.Ct. at 2411.

Applying this analysis to Mr. Blakely's exceptional sentence, the sentencing factors prove to be sentencing factors in truth and not just by label. The Washington statute lists most crimes in WASH. REV. CODE Title 9A, including kidnaping and assault. WASH. REV. CODE §§ 9A.40.030 & 9A.36.021 (2002). Title 9A also sets forth the statutory maximum penalties. WASH. REV. CODE § 9A.20.021. Felony sentencing, however, is set out in a different title, WASH. REV. CODE § 9.94A, the Sentencing Reform Act. In this chapter, the legislature authorizes exceptional sentences and provides illustrative mitigating and aggravating factors. WASH. REV. CODE § 9.94A.535 (2002).

Next, the *Harris* court looked to "critical textual clues" and past practice in which the enhancement may have been treated as an element. *Harris*, 536 U.S. 553, 122 S.Ct. at 2412. "Traditional sentencing factors often involve either characteristics of the offender or special features of the manner in which a basic crime was carried out." *Castillo v. United States*, 530 U.S. 120, 126, 120 S.Ct. 2090, 2094, 147 L.Ed.2d 94 (2000). The mitigating and aggravating factors for exceptional sentences in WASH. REV. CODE § 9.94A.535 embody the *Castillo* definition, and are integral to the fabric of the SRA. Because this section is integral to the SRA's structure, it cannot be said that the enhancement factors alter a defendant's punishment in a manner not usually associated with sentencing factors.

In Mr. Blakely's appeal, the Washington Court of Appeals *declined* to affirm the sentence on the basis of deliberate cruelty. *State v. Blakely*, 111 Wash. App. 851,

869, 47 P.2d 149, 158 (2002). The court affirmed the sentence on the uncontested domestic violence aggravating factors alone. *Id.* Domestic violence, e.g., the fact of commission within sight or sound of a minor child, is not an actual or traditional element of kidnaping or assault. Clearly the aggravating factors regard the relationship of the defendant to his victims and "special features of the manner" in which he carried out his crimes.

The Washington Supreme Court has held that

> aggravating factors neither increase the maximum sentence nor define a separate offense calling for a separate penalty. . . . The state statutory scheme permits a judge to impose an exceptional sentence – still within the range determined by the Legislature and not exceeding the maximum – after considering the circumstances of an offense, and, as *McMillan* and *Apprendi* indicate, it may do so without the factual determinations being charged, submitted to a jury, or proved beyond a reasonable doubt.

State v. Gore, 143 Wash.2d 288, 314, 21 P.3d 262, 277 (2001). The ruling conforms with this Court's precedent.

D. FEDERALISM PERMITS A CONFLICT OF LAWS.

The Petitioner argues that there is a "split of authority," a division between the states' highest courts. Petition at 7. The Petitioner sets forth that four states with similar sentencing systems have addressed the question of whether the standard range defines the statutory maximum. Petition at 8-9. Illinois, Minnesota, and Washington courts have resolved that exceptional sentences below the legal maximum but above the standard range do not implicate the *Apprendi* jury requirement. Id.

The Petitioner reports that a single court, the Kansas Supreme Court, has interpreted its state laws differently – to extend the jury requirement to exceptional sentences *by finding* that the upper limit of the presumptive range is the statutory maximum. *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001). On this procedural issue, the Kansas court has chosen to ignore the legislative maximum penalties established under Kan. Stat. Ann. § 21-5401 (2003). *State v. Gould*, 271 Kan. at 410-11, 23 P.3d at 813. A state court's interpretation of a statute "puts these words in the statute as surely as if it had been so amended by the legislature." *Winters v. New York*, 333 U.S. 507, 68 S.Ct. 665, 669, 92 L.Ed.2d (1948).

The so-called split of authority regarding the interpretation of different laws in different states is an illusory dilemma under the federalism principle. Any state is free to legislate differently from any other so long as the law does not contravene a power delegated to the federal government. U.S. Const. amend. X. The supreme courts of each state are the "ultimate expositors" of those state laws, and their construction of state law is authoritative. *Mullaney v. Wilbur*, 421 U.S. 684, 691, 95 S.Ct. 1881, 1886, 44 L.Ed.2d 508 (1975). The Kansas Supreme Court is the final arbiter of the statutory maximum penalty under Kansas law; and the Washington Supreme Court is the final arbiter of the statutory maximum penalty under Washington law.

Because the two courts interpret two different state laws to be different, the laws defining statutory maximums *are* different. Under the U.S. Constitution and under *Apprendi*, this "conflict" is neither problematic nor deserving of this Court's concern.

E. JURY FINDINGS ARE UNLIKELY TO ALTER THIS SENTENCE.

The Petitioner contends that the instant case is an ideal vehicle for review, because a jury would be unlikely to find beyond reasonable doubt the "hotly disputed" factors which support the exceptional sentence. The argument fails, because the factors are undisputed.

The Petitioner argues that, based upon Mr. Blakely's mental condition, it would be unlikely that a jury would find Mr. Blakely guilty beyond a reasonable doubt of *deliberate cruelty*. This argument fails for two reasons.

First, the Washington Court of Appeals affirmed the sentence based *only* upon the domestic violence factors. *State v. Blakely*, 111 Wash. App. 851, 869, 47 P.2d 149, 158 (2002). The Court of Appeals did *not* rely upon a finding of deliberate cruelty under WASH. REV. CODE § 9.94A.535(2)(a). *Id.*

Second, in an unusual procedure, a jury determined Mr. Blakely's mental condition. The jury heard testimony from the state's witnesses Dr. Verne Cressey and Dr. William Fredrickson. Dr. Cressey had examined Mr. Blakely in 1987. VRP 184. Both doctors examined Mr. Blakely over several months in 1999. VRP 186, 190, 243, 277, 280. They concluded Mr. Blakely had personality disorders (antisocial/narcissistic), but had never been schizophrenic. VRP 258-62, 290. Dr. Cressey explained that private doctors generally treat patients who genuinely seek treatment. VRP 250-53. Accordingly, they are less vigilant or familiar with the criminal impetus toward malingering or faking, often overlooking this diagnosis, as happened with Mr. Blakely. Id. Mr. Blakely's history indicates that he only sought psychiatric treatment as a

means of escaping legal responsibility. *Blakely*, 111 Wash. App. at 858, 47 P.2d at 153. Dr. Paul Wert, the expert witness hired by the defense, switched sides after a final interview with the Defendant and testified that Mr. Blakely was competent. VRP 165-66, 173-75. Mr. Blakely was unable to maintain a consistent performance in court, and at post-conviction hearing the trial court noted that Mr. Blakely's act was undermined by the savvy content of his whispers "loud enough to be heard at the bench." VRP July 31, 2000 at 16. The jury found Mr. Blakely competent. VRP 345-48.

When considering Mr. Blakely's mental condition under the full and fair context of the record, it is safe to say that a jury would not have been "hard pressed" to find Mr. Blakely's remorseless malingering with antisocial, misogynistic, and narcissistic components aggravated, not mitigated, the offenses. Diagnosed as malingering, Mr. Blakely alternately argued he had no memory of events or that he had intended to reunite the family. However, there was substantial evidence that Mr. Blakely was aware of the wrongfulness of his actions at the time of their commission (VRP 636, 659, 660, 679, 730, 735, 858, 870) and that his motivation was financial and not conciliatory (VRP 634, 636, 640, 646-49, 677-83, 687-88). Mr. Blakely maintained a girlfriend after separation from his wife and called Ms. Barros throughout the kidnaping to reassure her (VRP 678), never once suggesting reconciliation with his wife (VRP 719).

Deliberate cruelty is manifest in multiple, inescapable facts extraneous from the elements of kidnaping: the homemade coffin tailored to Mrs. Blakely's measurements; the multiple weapons used to threaten the victims; threats to kill; slicing Mrs. Blakely's nostrils and throat with a

knife; threatening each victim with the harm of the other; forcing a thirteen year old to drive cross country back roads in the dark; threatening to hire hitmen; the denial of food, water, and warmth; the confinement in extremely close areas; humiliation of Mrs. Blakely when she needed to relieve herself; demanding information on adult children who had finally escaped their father's terrorism; violating a restraining order; theft of the family's financial resources; violation of Mrs. Blakely's litigation rights; the interstate element which added to Mrs. Blakely's sense of powerlessness; and the history of dehumanization, incapacitation, and brutalization of Mrs. Blakely's person and spirit throughout her marriage. The trial court held that "any reasoning person" would find Mr. Blakely's acts to be "not only cruelty, but deliberate cruelty." VRP July 31, 2000 at 41.

The Petitioner argues that Mr. Blakely's motion to withdraw his guilty plea was motivated by the court's exceptional sentence. Petition at 5, 18. This is not borne out by the record. In fact, the court did not sentence Mr. Blakely until *after* the motion to withdraw plea was heard. Mr. Blakely argued that his plea was involuntary due to lack of sleep and duress from his own counsel. VRP July 31, 2000 at 3. The court heard and denied the motion on July 31, 2000. VRP July 31, 2000 at 2-18. On that same day, but after this determination of the motion, the court proceeded to hear Mrs. Blakely's victim impact statement for the first time. VRP July 31, 2000 at 23-36. The court then sentenced Mr. Blakely. VRP July 31, 2000 at 42. On October 4, 2000, Mr. Blakely made a second motion to withdraw plea. VRP 583. The second motion argued that the State breached the plea agreement by responding to the defense motion for a standard range sentence and

supporting the court's authority to sentence outside the standard range. VRP 584. The court denied this motion as well and only then proceeded to the three day evidentiary hearing for sentencing. VRP 586-87.

The Petitioner argues that the exceptional sentence was "based on additional facts that Petitioner hotly disputed." Petition at 18. This is also unsupported by the record. Mr. Blakely's entire defense was incapacity, and not denial of the multiple facts that evinced deliberate cruelty. Those facts are *undisputed*. In cross-examination, defense counsel did not suggest that the details of the crime were fabricated. The incapacity argument is waived by guilty plea. A jury determined competency.

The fact that the crimes were committed within sight or sound of Ralphy Blakely, then 13 years old, is also *undisputed*. *State v. Blakely*, 111 Wash. App. 851, 869, 47 P.2d 149, 158 (2002). See also VRP 872-74 for the entire cross-examination of Ralphy Blakely which does not dispute the child's presence. The trial court held that "Mr. Blakely not only forcibly kidnaped his estranged wife and did it in the deliberately cruel way that I indicated, but put his son in the position of frantically reporting that to anyone he could notify. To watching it happen. That circumstance must forever imprint and distort the way that this child will think of his parents. Both of his parents." VRP July 31, 2000 at 42. The trial court ruled that "[t]here is no question on the evidence before me that this act occurred and was designed to occur within the sight or sound of Ralphy, the child of these parties." VRP 1048. Should the Petitioner now for the first time dispute this fact in violation of procedure, the State could call the various witnesses at the gas station where the child escaped and begged bystanders for assistance. There

would be no difficulty in proving this fact beyond reasonable doubt. Based on the child's report and the reports of multiple witnesses at the gas station, law enforcement was dispatched over three states to find Mr. Blakely and rescue Mrs. Blakely.

Because it is unlikely that a jury's finding would alter the sentence, the Petitioner's arguments fail.

F. THE EXTENSION OF *APPRENDI* PROPOSED BY THE PETITIONER IS CONTRARY TO PUBLIC POLICY.

The Petitioner advocates extending the *Apprendi* requirement of jury findings to any sentence that exceeds the standard range. The Petitioner contends that the extension of *Apprendi* advocated "is of great importance." Petition at 15. Many states have sentencing guidelines like those in Washington state. Petition at 16. Therefore, the extension of *Apprendi* would have far-reaching impact. It would not, however, affect federal sentencing, because federal guidelines are promulgated by a judicial sentencing commission and not by legislative act. Petition at 17; Amici Brief at 3. Therefore, extending *Apprendi* to sentences over the standard guideline but below the legislative maximum, as the Petitioner proposes, would unequally impact the states, disabling state guidelines while preserving federal ones. It is poor policy to conflate guidelines with maximums in order to unequally burden states with the costs of jury findings.

Professor Erwin Chemerinsky of USC Law School has explained that "the central premise of *Apprendi* is that it is wrong to convict someone of one crime, and sentence them for another," quoted in David E. Rovella, *A Looming*

'Apprendi' Tsunami?, NAT'L L. J. (January 2, 2001). In *Apprendi*, the hate crime motive "triggered" a provision or separate law which allowed a greater sentence than the maximum. However, not every enhancement factor triggers a separate crime or a sentence beyond the maximum. In Mr. Blakely's case, the court's finding that the crimes were committed within sight and sound of the Blakely's child and that they were committed with deliberate cruelty toward family or household members did not trigger a separate law or crime. The crime remained the same. And the sentence maximum remained the same.

The *Apprendi* issue is distinctly procedural. *Apprendi v. New Jersey*, 530 U.S. 466, 488, 120 S.Ct. 2348, 2362, 147 L.Ed.2d 435 (2000); *United States v. Montalvo*, 331 F.3d 1052, 1061 (9th Cir. 2003). Notice and predictability are material. Under the SRA, a defendant has both. Mr. Blakely had notice that the court could sentence outside the standard range and that the maximum sentence for his crimes was ten years. This notice was clear in the plea agreement (CP 495) and the statute (WASH. REV. CODE § 9A.20.021). The statute lists various aggravating factors. WASH. REV. CODE § 9.94A.535 (2002). Although the list is not exhaustive, the trial court did not go outside it. The court found that Mr. Blakely involved his minor child in his acts of violence and that the domestic violence kidnapings were accomplished with deliberate cruelty. Mr. Blakely had notice of these facts in discovery and notice that these facts would not be hidden from the court. The statute gave Mr. Blakely notice that the court would hear from the victims, law enforcement, and the Department of Corrections before sentencing. WASH. REV. CODE § 9.94A.500(1) at para. 4 (2002). The trial court sentenced Mr. Blakely to a term *less* than ten years.

Traditionally, sentencing courts have fought the imposition of standard ranges, jealous of their discretion. However, standard ranges/guidelines provide defendants with an extra measure of predictability or assurance. Due to these ranges, defendants know that their sentences will not vary wildly depending on the judge and that the judge's discretion is checked by clear guidelines. WASH. REV. CODE § 9.94A.585 (2002). They can trust that exceptional sentences must be supported on the record and are appealable. Id.

If this Court were to find that the upper limit of these guidelines was in fact the statutory maximum, despite clear and long established legislative intent to the contrary, the legislature may balk. The costs of calling in a jury every time a court finds exceptional or mitigating factors is prohibitive. Extending *Apprendi* to exceptional sentences is inefficient and costly, forcing the cost of a jury and lengthy evidentiary hearing even when the defendant pleads guilty. It reduces the administrative benefits of a plea, therefore reducing the state's incentive to negotiate a plea. The legislatures are likely to respond by raising the upper limits of the ranges or abolishing them altogether. "[A] few academics warn there may be a backlash to *Apprendi* in the states, where legislatures may seek to avoid the ruling's constraints by rewriting their criminal statutes to include Draconian maximum sentences as cover for sentencing enhancements." David E. Rovella, *A Looming 'Apprendi' Tsunami?*, NAT'L L. J. (January 2, 2001).

The likely outcome of such an extension of *Apprendi* would not benefit defendants. It would discourage the state from offering plea deals and encourage the legislature to write out standard ranges, a result inconsistent

with the concerns of this Court for clear sentencing standards.

CONCLUSION

Based upon the forgoing, Respondent respectfully requests this Court deny the petition for writ of certiorari.

Respectfully submitted,

JOHN D. KNODELL
(*Counsel of Record*)
Prosecuting Attorney
P.O. Box 37
Ephrata, Washington 98823
(509) 754-2011

Attorney for the Respondent

September 12, 2003

Supreme Court, U.S.
FILED
SEP 17 2003
OFFICE OF THE CLERK

(4)

No. 02-1632

IN THE
Supreme Court of the United States

RALPH HOWARD BLAKELY, JR.
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

On Petition for a Writ of Certiorari
to the Washington Court of Appeals, Division III

PETITIONER'S REPLY BRIEF

BRUCE E. H. JOHNSON
(Counsel of Record)
JEFFREY L. FISHER
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150

12 pp

TABLE OF CONTENTS

PETITIONER'S REPLY BRIEF 1

A. The Issue Whether the Top of a Statutory Standard Sentencing Range Functions as a "Statutory Maximum" Under *Apprendi* is One of Federal Law, Over Which the States' Highest Courts are Squarely Divided. 1

B. The Decision Below Contravenes This Court's Precedent. 4

C. This Case is an Excellent Vehicle for Considering the Question Presented 6

CONCLUSION 8

TABLE OF AUTHORITIES

Cases:

Apprendi v. New Jersey, 530 U.S. 466 (2000) ..... passim

Harris v. United States, 536 U.S. 545 (2002) 4

McMillan v. Pennsylvania, 477 U.S. 79 (1986) 4, 5

Ring v. Arizona, 536 U.S. 584 (2002) 2, 3, 5

State v. Brown, 70 P.3d 454 (Ariz. App. 2003).....3

State v. Gore, 143 Wn.2d 288, 21 P.3d 262 (2001) 1, 4, 5

State v. Gould, 23 P.3d 801 (Kan. 2001).....1, 3

State v. Scott, 72 Wn. App. 207, 214 (1993).....8

State v. Wicklund, 96 Wn.2d 798, 800 (1982).....7

Statutes:

Rev. Code Wash. § 9.94A.120(1) 3, 4

Rev. Code Wash. § 9.94A.120(2) 3, 4

Rev. Code Wash. § 9.94A.390 4

Rev. Code Wash. § 9.94A.390(2)(a) 6

Rev. Code Wash. § 9.94A.390(2)(h)(ii).....7

Rev. Code Wash. § 9.94A.390(2)(h)(iii).....7

Other Authority:

Brief in Opposition, *Buchanan v. State*, No. 02-7807..... 1-2

PETITIONER'S REPLY BRIEF

The State does not contest that this case presents an exceptionally important issue of criminal procedure regarding criminal sentencing law in numerous states. Nor is there any disagreement as to how Washington law – or any other state's law that is impacted in this case – works: Statutes require courts to sentence defendants within certain standard sentencing ranges unless they find aggravating facts that are not already encompassed in the elements of the crimes of conviction. Additional statutory provisions cap the extent of upward departures, but it remains that courts may not depart upward in the first place without finding aggravating facts to be present.

Although the State advances a series of arguments aimed at deflating the need for review of the constitutionality of such sentencing systems, none of them is persuasive. This Court, accordingly, should grant certiorari to resolve the pressing question of how *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applies to facts necessary for departing upward from such statutory standard sentencing ranges.

A. The Issue Whether the Top of a Statutory Standard Sentencing Range Functions as a "Statutory Maximum" Under *Apprendi* is One of Federal Law, Over Which the States' Highest Courts are Squarely Divided.

In *Buchanan v. Washington*, No. 02-7807, the only other time this issue has been before this Court, the State "concede[d] that the Kansas sentencing scheme involved in *State v. Gould* [23 P.3d 801 (Kan. 2001)] is materially indistinguishable from Washington's Sentencing Reform Act (SRA) at issue in the present case. The Washington Supreme Court's holding in *Gore*," the State continued, "is thus in *direct conflict* with *Gould*." Brief in Opp., *Buchanan v. Washington*,

No. 02-7807, at 16 (emphasis added). The State in *Buchanan* nevertheless urged this Court to deny certiorari on the ground that the petitioner had stipulated both to the facts supporting her "exceptional sentence" and to the State's ability to seek such a sentence. *Id.* at 13-16. With that potential vehicle problem not present in this case, the State now suggests that this "so-called split of authority" is an "illusory dilemma" because the question what constitutes a "statutory maximum" for purposes of triggering the protections of *Apprendi* is one of state, not federal, law. Brief in Opp. at 15.

The State obviously had it right the first time. *Apprendi* laid down a rule of federal constitutional law: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the *prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490 (emphasis added). In other words, "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – *no matter how the State labels it* – must be found by a jury beyond a reasonable doubt." *Ring v. Arizona*, 536 U.S. 584, 602 (2002) (emphasis added); *see also Apprendi*, 530 U.S. at 501 (Thomas, J., concurring). The issue here, therefore, is not whether Washington *labels* the top of a standard sentencing range as a statutory maximum. It is whether the top of a standard sentencing range *functions* as a statutory maximum. *Id.*; *see also Apprendi*, 530 U.S. at 494 (constitutional issue "is not one of form, but of effect").

As to that question, there is no dispute concerning how Washington law (just like the law of the other states implicated in this conflict, *see* Pet. for Cert. at 15-16 & nn. 7-8) works. Following a conviction or guilty plea, courts are required to impose a sentence within the statutory standard range unless they find aggravating facts, by a preponderance of the evidence, that support imposing an exceptional sentence. Rev. Code Wash. §§ 9.94A.120(1)-(2); *see also* Brief in Opp. at 10

(acknowledging that court is "bound" to applicable grid box unless it finds facts supporting exceptional sentence). "A reason offered to justify an exceptional sentence can be considered only if it takes into account factors *other than those which are used in computing the standard range sentence for the offense*." *State v. Gore*, 143 Wn.2d 288, 315-36 (2001) (emphasis added). If a court finds such factors and decides to impose an exceptional sentence, separate provisions of law cap the extent to which the court can increase the defendant's sentence. Rev. Code Wash. §§ 9A.20.121 & 9.94A.120(14).

In light of this underlying state law, the federal question presented by this case is whether the top of a statutory standard sentencing range such as Washington's operates as a "statutory maximum" as *Apprendi* defines that term, 530 U.S. at 490, so that factual findings necessary to increase a sentence above such a range must be submitted to a jury and proved beyond a reasonable doubt. State courts, expressly applying *Apprendi*, are squarely divided on that important issue. *See* Pet. for Cert. 8-9.* Only this Court can resolve this conflict.

---

* Since the Petition for Certiorari was filed, yet another state has been drawn into this confusion. Although Arizona does not call its sentencing laws "guidelines," it, just like Washington, sets statutory "presumptive sentences" from which courts may depart upward only if they find aggravating facts not encompassed in the elements of the underlying crime. *See State v. Brown*, 70 P.3d 454, 456-57 (Ariz. App. May 23, 2003). Such facts need not be submitted to a jury or established beyond a reasonable doubt. An Arizona trial court ruled that this scheme violated *Apprendi* because the presumptive sentences set "maximums" as *Apprendi* defines that term. *Id.* at 457, 460 (describing trial court's decision). Although the Arizona Court of Appeals acknowledged that the trial court's decision was consistent with the Kansas Supreme Court's in *Gould*, it adopted the reasoning of the other side of the split and reversed on the ground that another statutory provision capping the maximum for upward departures renders *Apprendi* inapplicable to the tops of presumptive sentences. *Id.* at 462. The court of appeals distinguished *Ring* on the basis that "[i]n non-capital cases, aggravators need be supported only by reasonable evidence,

B. The Decision Below Contravenes This Court's Precedent.

The State contends that the Washington Supreme Court's opinion in *Gore* and the Court of Appeals' decision here following that opinion are consistent with this Court's precedent because (1) statutory standard sentencing ranges "operate[] solely to limit the sentencing court's discretion within the range already available to it," Brief Opp. at 11 (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986)); and (2) "the purpose of the standard range is to provide some uniformity in sentencing for those who commit a 'typical' offense," Brief in Opp. at 10. Neither of these arguments withstands scrutiny.

1. The State's *McMillan* argument rests on a flawed premise. While the State is correct that *McMillan* and *Harris v. United States*, 536 U.S. 545 (2002), hold that *Apprendi* does not apply to laws that merely dictate a certain sentence "within a range already available" to a sentencing court pursuant to the defendant's guilty plea, *McMillan*, 477 U.S. at 88, Washington's exceptional sentence laws permit sentences that are *not* already available to courts. Under Washington statutes, a sentencing court "shall impose" a sentence "within the standard sentence range" unless it finds that additional facts, not already encompassed by the jury verdict or guilty plea, support an exceptional sentence. Rev. Code Wash. §§ 9.94A.120(1) & (2); *see also* § 9.94A.390 (setting forth illustrative list of aggravating circumstances). Alternately stated, at the moment a defendant pleads or is found guilty of a crime, the only sentencing range that is legally available to a Washington court is the standard range. Imposing an exceptional (*i.e.*, an increased) sentence is not an option unless and until a court

---

not proven beyond a doubt." *Id.* at 462 n.9 (quotation and citation omitted). It never explained why *Apprendi* should apply differently to increases in non-capital sentences.

finds the presence of an aggravating fact not encompassed in the elements of the underlying crime. *Gore*, 143 Wn.2d at 315. Accordingly, the procedures for finding such an additional fact are governed by *Apprendi*, not *McMillan*.

The State's argument, in fact, essentially repeats the same contention that the State of Arizona advanced in *Ring* – namely, that a certain sentence is available to a sentencing court, regardless of whether additional findings are necessary to impose it, so long as a provision of state law says that the sentence is a permissible punishment for the crime of conviction. But, as this Court explained in rejecting that argument, "[t]he Arizona first-degree murder statute authorizes a maximum penalty of death only in the formal sense, . . . for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before the imposition of the death penalty. If Arizona prevailed on [this] argument, *Apprendi* would be reduced to a meaningless and formalistic rule of statutory drafting." *Ring*, 536 U.S. at 604 (internal quotations and citation omitted).

The State does not attempt to distinguish *Ring*. Nor does it contest that the maximum sentence that Washington statutory law permits in Petitioner's case, in the absence of finding aggravating factors not encompassed in his guilty plea to second degree kidnapping, was 53 months. As such, the procedures for making such factual findings are subject to *Apprendi*. Washington law's "formal" acknowledgment, *id.*, that Petitioner's sentence could exceed 53 months if aggravating facts were found does not affect the result here.

2. The State's argument regarding "uniformity" is equally misguided. Whether the sentencing laws at issue are intended to provide uniformity is irrelevant under *Apprendi*. The laws in *Apprendi* and *Ring* presumably were designed to provide uniformity by laying out specific facts that courts needed to find before they could impose stiffer sentences, but

this legislative goal made no difference in those cases. All that matters under *Apprendi* is whether the statutory scheme at issue subjects a defendant to heightened punishment contingent on the finding of a fact, without requiring that fact to be found by a jury beyond a reasonable doubt.

In any event, Petitioner's argument does not threaten the consistency that Washington's Sentencing Reform Act is aimed at generating. All Petitioner's argument seeks is to require the State to allege facts supporting exceptional sentences in indictments and, if defendants contest them, to prove them to a jury beyond a reasonable doubt, instead of by a preponderance to a judge. Contrary to the State's suggestion (Brief in Opp. at 22), such a rule would not require "calling in a jury every time" the State alleged aggravating factors. Such factors could form the basis for plea bargaining just like any other element of a crime. Nor is there any reason to believe that the Washington Legislature would have any problem with such a change or would abolish structured sentencing in response to it. "[S]tructural democratic constraints" tend to push legislative bodies towards preserving laws that foster proportionate criminal punishment. *Apprendi*, 530 U.S. at 490 n.16.

C. This Case is an Excellent Vehicle for Considering the Question Presented.

None of the State's attempts to cast this case as an unsuitable vehicle for deciding the question presented has merit.

1. The State's assertion (Brief in Opp. at 13-14, 16) that Petitioner's sentence does not rest in part on a finding of "deliberate cruelty" is simply untrue. In affirming Petitioner's sentence, the Court of Appeals ruled that "[w]hether or not deliberate cruelty under former RCW 9.94A.390(2)(a) (1997) could be used to elevate the sentence for second degree

kidnapping, the alternate basis of domestic violence *with deliberate cruelty* supports the exceptional sentence here." Pet. App. 17a n.4 (emphasis added). Lest there be any doubt, the Court of Appeals' opinion cites to Rev. Code Wash §§ 9.94A.390(2)(h)(ii) & (iii) as codifying the aggravating factors upon which it was relying. Pet. App. 17a. The latter statutory provision refers to committing domestic violence when "[t]he offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim."

Even if the Court of Appeals had relied solely on the trial court's finding of domestic violence within the sight or sound of a child in upholding Petitioner's exceptional sentence, it would not in any way have removed the *Apprendi* issue from this case. The State acknowledges that committing domestic violence within sight or sound of a child "is not an actual or traditional element of kidnapping or assault." Brief in Opp. at 14. That is precisely why that fact was not included in Petitioner's guilty plea. It also is precisely why he had the right to force the State to prove it under the procedures mandated by *Apprendi* before a court could use it as a basis to increase his sentence beyond the maximum permissible for the bare offenses of kidnapping and assault.

2. Nor is the State's harmless error argument credible. That a jury in a pretrial hearing found (by clear and convincing evidence) that Petitioner was competent to stand trial (*see* Brief in Opp. at 16-17) has no bearing on whether it would have found that he acted with deliberate cruelty in committing the offenses at issue. These are two different inquiries aimed at assessing the defendant's mental state at different points in time. A defendant is competent to stand trial if, at the time of trial, he "is capable of properly understanding the nature of the proceedings against him [and] he is capable of rationally assisting his legal counsel in the defense of his cause." *State v. Wicklund*, 96 Wn.2d 798, 800 (1982). In contrast, a defendant

acts with deliberate cruelty if, at the time of the crime, he inflicts "gratuitous violence or [engages in] other conduct which inflicts physical, psychological, or emotional pain as an end in itself." Pet. App. 16a (quoting *State v. Scott*, 72 Wn. App. 207, 214 (1993)). The jury was never asked during the pretrial competency proceeding to consider the latter issue.

Only a few concluding words are necessary concerning the State's argument (Brief in Opp. at 17-20) that a jury, if asked to do so, would have found the aggravator of domestic violence with deliberate cruelty. Regardless of the extent to which various historical, underlying facts were actively contested in proceedings below, Petitioner plainly and consistently disputed the suggestion that he acted with deliberate cruelty here. The trial court termed this issue a "complex" one and noted that "[t]here has always been, in this case, a great deal of dispute about such things as [Petitioner's] mental condition at the time that these offenses occurred [and Petitioner's] motivation for doing what he did." Pet. App. 32a, 46a. Like the sentencing court in *Apprendi*, 530 U.S. at 470, 475, in fact, the trial court held a "full evidentiary hearing" that lasted for three days on the issue. This case history is more than enough to show that the trial court's refusal to submit the proposed aggravators to a jury may have affected the outcome here. And it is more than enough to demonstrate that this case is an excellent vehicle for resolving the *Apprendi* question presented.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

BRUCE E. H. JOHNSON
(Counsel of Record)
JEFFREY L. FISHER
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150

September 17, 2003

Attorneys for Petitioner

Supreme Court, U.S.
FILED
JUN 9 2003
OFFICE OF THE CLERK

(2)

No. 02-1632

IN THE
Supreme Court of the United States

RALPH HOWARD BLAKELY, JR.,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

On Petition for a Writ of Certiorari to the Washington State Court of Appeals, Division III

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS IN SUPPORT OF PETITIONER

Adam N. Steinman
Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
(206) 583-8888

Mary Price
Families Against Mandatory Minimums
1612 K Street, N.W., Suite 700
Washington, DC 20006
(202) 822-6700

David M. Porter
Counsel of Record
National Association of Criminal Defense Lawyers
1150 18th Street, N.W.
Suite 950
Washington, DC 20036
(202) 872-8600

TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. *Apprendi* Requires that Any Fact Necessary for an Upward Departure from a Statutory Sentencing Range Must be Proven to a Jury Beyond a Reasonable Doubt. 4

II. State Courts Have Split Over the Application of *Apprendi* to Upward Departures from Statutory Sentencing Ranges, and this Issue Affects States Throughout the Country. 10

III. Applying *Apprendi* to Upward Departures from *Statutory* State Sentencing Guidelines Would Not Invalidate the Federal Sentencing Guidelines, Which are Promulgated by an Independent Commission Within the Judicial Branch 13

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Apprendi v. New Jersey, 530 U.S. 466 (2000).....passim

McMillan v. Pennsylvania, 477 U.S. 79 (1986)..... 9

Mistretta v. United States, 488 U.S. 361 (1989)..... 14

People v. Rivera, 62 P.3d 1056 (Colo. App. 2002)..... 12

People v. Swift, 781 N.E.2d 292 (Ill. 2002), *cert. denied*, 123 S. Ct. 1803 (2003)..... 12

Ring v. Arizona, 536 U.S. 584 (2002) 6, 8, 9, 10

State v. Blakely, 111 Wn. App. 851, 47 P.3d 149 (2002), *review denied*, 62 P.3d 889 (2003)..... 7

State v. Buchanan, 110 Wn. App. 1031, 2003 Wash. App. LEXIS 293 (Feb. 15, 2002), *review denied*, 53 P.3d 1008 (2002), *cert. denied*, 123 S. Ct. 1266 (2003)..... 8

State v. Gore, 143 Wn.2d 288, 21 P.3d 262 (2001) 4, 7

State v. Gould, 23 P.2d 801 (Kan. 2001).....10, 11

State v. Ramires, 109 Wn. App. 749, 37 P.3d 343, *review denied*, 52 P.3d 521 (2002)..... 8

State v. Taylor, 111 Wn. App. 519, 45 P.3d 1112 (2002), *review denied*, 60 P.3d 1212 (2003)..... 7

State v. Urlacher, 111 Wn. App. 1020, 2002 Wash. App. LEXIS 739 (Apr. 26, 2002), *review denied*, 60 P.3d 92 (2002)..... 8

United States v. Cotton, 535 U.S. 625 (2002)..... 1

Statutes

Wash. Rev. Code § 9.94A.120 (2000) 4, 6, 9

Wash. Rev. Code § 9.94A.310 (2000) 13

Wash. Rev. Code § 9.94A.370 (2000) 4

Wash. Rev. Code § 9.94A.390 (2000) 4

Wash. Rev. Code § 9.94A.505 (2002) 4

Wash. Rev. Code § 9.94A.535 (2002) 4

Wash. Rev. Code § 9A.20.021 (2000) 8

Other Authorities

Cut Prison Costs Without Jeopardizing Public Safety, Roanoke Times & World News, Jan. 23, 2003..... 12

Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines, 44 St. Louis U. L.J. 425 (2000)..... 12

Justice Pushes Indigent Defense, Augusta Chronicle, Feb. 1, 2003..... 12

INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors.[1] Among the NACDL's objectives are to promote the proper administration of justice and to ensure that findings that impact the length of criminal sentences are made according to constitutionally required procedures.

Families Against Mandatory Minimums (FAMM) is a nonprofit, nonpartisan organization with nearly 30,000 members and forty chapters nationwide. FAMM conducts research, promotes advocacy and educates the public regarding the excessive costs of mandatory minimum sentencing. The costs are not limited to public expenditures but include the perpetuation of unwarranted sentencing disparities, disproportionate sentences, and the transfer of the sentencing function from the judiciary to the prosecution. FAMM does not argue that crime should go unpunished, but that the punishment should fit the crime and culpability of the offender.

Both the NACDL and FAMM have appeared as *amici curiae* in this Court on numerous occasions, including *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and cases applying *Apprendi*. *See, e.g., United States v. Cotton*, 535 U.S. 625 (2002). Because the decision below is contrary to the rule set forth by this Court in *Apprendi* and irreconcilably

---

[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amici curiae* state that no counsel for a party authored any part of this brief, and no person or entity, other than *amici curiae*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief.

conflicts with the highest court of another state, NACDL and FAMM respectfully submit this brief *amici curiae* in support of Petitioner.

SUMMARY OF ARGUMENT

Where a state sentencing scheme requires the existence of aggravating factors in order to depart upward from statutorily imposed sentencing guidelines, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), mandates that such factors be found by a jury beyond a reasonable doubt. Where, as here, these factors are found only by a judge under a preponderance of evidence standard, *Apprendi* does not allow a sentence in excess of the statutory guideline range.

Apprendi holds that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. The aggravating factors found in this case increased Petitioner's sentence beyond the maximum allowed by the statutory sentencing guidelines. Thus, these facts are precisely the sort that must be proven to a jury beyond a reasonable doubt. Imposing an upward departure based solely on a ***judge's*** finding of aggravating factors contravenes *Apprendi*'s fundamental holding.

The Washington courts mistakenly hold that *Apprendi* does not apply because another statutory provision limits the total sentence that may be imposed in the event of an upward departure. But to accept this logic would render *Apprendi* meaningless—a state could circumvent *Apprendi* entirely simply by enacting a statute providing that punishments for non-capital felonies may never exceed life imprisonment.

Indeed, the Washington courts' application of *Apprendi* directly conflicts with a recent decision of the Kansas Supreme Court, which held that *Apprendi* required a jury finding beyond a reasonable doubt in order to impose an upward departure from Kansas' structurally identical statutory sentencing guidelines. There is a pressing need to resolve this conflict, because many other states have statutory guidelines systems like Kansas and Washington, and others have sentencing schemes that implicate similar *Apprendi* issues. Yet more states are considering adopting sentencing guidelines, and they too will benefit from guidance by this Court on this exceptionally important issue.

Finally, granting certiorari in this case would not threaten the federal sentencing guidelines because the federal guidelines are set by the United States Sentencing Commission, not by statute. The application of *Apprendi* to ***statutory*** maximum sentences, on the other hand, is well established.

Resolving the conflict over *Apprendi*'s effect on upward departures from state statutory sentencing guidelines is critically important for practitioners, defendants, judges, and lawmakers throughout the country. This issue is a pure question of law concerning the scope of *Apprendi*, and there is nothing to be gained by delaying resolution by this Court. To allow the present state of uncertainty to continue will perpetuate confusion within the criminal justice system and impair the faithful application of *Apprendi*.

ARGUMENT

I. *Apprendi* Requires that Any Fact Necessary for an Upward Departure from a Statutory Sentencing Range Must be Proven to a Jury Beyond a Reasonable Doubt.

Under Washington's sentencing statute, the court must impose a sentence within the statutory guidelines range unless it finds that "aggravating factors" justify an exceptional sentence upward. *State v. Gore*, 143 Wn.2d 288, 313, 21 P.3d 262 (2001); *see also* Wash. Rev. Code § 9.94A.120(1), (2) (2000) (providing that "the court ***shall*** impose a sentence within the sentence range for the offense" unless "it finds . . . substantial and compelling reasons justifying an exceptional sentence") (emphasis added).[2] The existence of such aggravating factors is precisely the kind of finding that must be made by a jury beyond a reasonable doubt under *Apprendi*. Washington law, however, allows such findings to be made by a judge, under a preponderance of the evidence standard. *See id.* § 9.94A.370(2) (2000).

In this case, the upward departure was based on the aggravating factor of domestic violence committed with deliberate cruelty and within the sight or sound of the victim's minor child. *See* Wash. Rev. Code § 9.94A.390(2)(h)(ii), (iii) (2000).[3] This factor—and this factor alone—enabled the court to impose a sentence in

---

[2] Although Washington has recently recodified parts of its sentencing laws, the standards governing upward departures remain the same. *See* Wash. Rev. Code §§ 9.94A.505(2)(a)(i), 9.94A.535 (2002).

[3] The trial court also found "deliberate cruelty" to be an independent, additional aggravating factor, *see* Wash. Rev. Code § 9.94A.390(2)(a) (2000), but the appellate court affirmed only the domestic violence aggravator. *See* Pet. App. 16a-17a.

excess of the statutory maximum set forth in Washington's sentencing guidelines. As a result, Petitioner received a 90-month sentence, more than three years longer than the maximum sentence allowed by the statutory standard range absent a finding of aggravating factors.

Under *Apprendi*, the facts underlying such an upward departure from a statutory sentencing guidelines range must be found by a jury beyond a reasonable doubt:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. . . . It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

Apprendi, 530 U.S. at 490 (citations and quotation marks omitted).

Thus, *Apprendi* dictates that "the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* at 494 (footnote omitted). The answer to that question in this case is an unequivocal yes. The court's finding of aggravating factors exposed Petitioner to a sentence greater than the statutory maximum sentence he would have faced absent such factors. These aggravating factors are what "increase[d] the prescribed range of penalties to which [Petitioner was] exposed." *Id.* at 490.

In *Ring v. Arizona*, 536 U.S. 584 (2002), this Court explained *Apprendi* as follows:

> If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt. A defendant may not be exposed to a penalty ***exceeding*** the maximum he would receive if punished according to the facts reflected in the jury verdict alone.

Id. at 602 (citing *Apprendi*, 530 U.S. at 482-83) (emphasis in original) (quotation marks omitted).

Washington's statutory sentencing scheme provides that "the court ***shall*** impose a sentence within the sentence range for the offense" unless aggravating factors exist. Wash. Rev. Code § 9.94A.120(1), (2) (2000) (emphasis added). Thus, imposing a sentence beyond the guideline range is "contingent on the finding" of such aggravating factors and, under *Apprendi*, this finding must be made "by the jury beyond a reasonable doubt." *Ring*, 536 U.S. at 602.

This Court's application of this straightforward principle to the facts of *Apprendi* is instructive. Mr. Apprendi pled guilty to unlawful possession of a firearm, the sentencing range for which was 5 to 10 years. *See Apprendi*, 530 U.S. at 468. At sentencing, the state court found by a preponderance of the evidence that Apprendi's crime was racially motivated, and enhanced Apprendi's sentence under New Jersey's hate crime statute. *See id.* at 471. Based on this finding, the court sentenced Apprendi to a 12-year prison term. *Id.*

This Court held that the hate crime finding could not be the basis for enhancing Apprendi's sentence beyond the statutory maximum for his gun possession offense, where that finding had not been made by the jury beyond a reasonable doubt. It reasoned:

> New Jersey threatened Apprendi with certain pains if he unlawfully possessed a weapon and with additional pains if he selected his victims with a purpose to intimidate them because of their race. As a matter of simple justice, it seems obvious that the procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment. Merely using the label "sentence enhancement" to describe the latter surely does not provide a principled basis for treating them differently.

Id. at 476. Here, the State of Washington threatened Petitioner with certain pains (the statutory standard guidelines) for kidnapping a person. It threatened him with additional pains (an upward departure beyond the maximum allowed by those guidelines) for exercising deliberate cruelty in connection with domestic violence. Thus, as in *Apprendi*, a jury finding beyond a reasonable doubt is necessary to authorize a sentence beyond the maximum set forth in the statutory standard range.

Washington courts, including the court below, have consistently rejected attempts to apply *Apprendi* to upward departures from the statutory sentencing guidelines. *See Gore*, 143 Wn.2d at 311-15; *State v. Taylor*, 111 Wn. App. 519, 524-25, 45 P.3d 1112 (2002), *review denied*, 60 P.3d 1212 (2003); *State v. Blakely*, 111 Wn. App. 851, 870-71, 47 P.3d 149 (2002), *review denied*, 62 P.3d 889 (2003); *State v.*

Urlacher, 111 Wn. App. 1020, 2002 Wash. App. LEXIS 739 (Apr. 26, 2002), *review denied*, 60 P.3d 92 (2002); *State v. Buchanan*, 110 Wn. App. 1031, 2003 Wash. App. LEXIS 293 (Feb. 15, 2002), *review denied*, 53 P.3d 1008 (2002), *cert. denied*, 123 S. Ct. 1266 (2003); *State v. Ramires*, 109 Wn. App. 749, 37 P.3d 343, 353, *review denied*, 52 P.3d 521 (2002). Instead, Washington state courts have erroneously concluded that *Apprendi* does not apply to such upward departures because a separate statutory provision limits the size of such a departure for particular felonies. The leading Washington Supreme Court case relies on the fact that an upward departure from the statutory guidelines may not result in a sentence greater than the ceilings imposed by Wash. Rev. Code § 9A.20.021 (2000) for each of three broad classes of felonies. *See Gore*, 143 Wn.2d at 313-14. For Petitioner's Class B felony conviction, § 9A.20.021 precludes the court from imposing an exceptional sentence of greater than 10 years.[4]

The mere fact that Washington law contemplates that some Class B felony convictions might result in a 10-year sentence does not thwart the application of *Apprendi* to an upward departure from the statutory sentencing guidelines. This Court rejected this logic in *Ring*, where the State made an identical argument in connection with Arizona's capital sentencing scheme. Because the Arizona statute "specifies 'death or life imprisonment' as the only sentencing options" for first degree murder, the State argued that the jury's first-degree murder conviction alone authorized the judge to sentence within this "range of punishment" up to and including the death penalty. *Ring*, 536 U.S. at 603-04 (citations omitted).

---

[4] For class A felonies, the sentence may not exceed life imprisonment; for class C felonies, the sentence may not exceed 5 years imprisonment. *See* Wash. Rev. Code § 9A.20.021(1)(a), (c) (2000).

This Court concluded that *Apprendi* flatly precluded such reasoning:

> This argument overlooks *Apprendi*'s instruction that the relevant inquiry is one not of form, but of effect. In effect, the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict. The Arizona first-degree murder statute authorizes a maximum penalty of death only in a formal sense, for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty. If Arizona prevailed on [this] argument, *Apprendi* would be reduced to a meaningless and formalistic rule of statutory drafting.

Id. at 604 (citations and quotation marks omitted).

Likewise, the Washington statute "authorizes a maximum penalty of [10 years] only in the formal sense." *Id.* In effect, Washington's sentencing scheme specifically requires a finding of aggravating factors in order to depart upward from the statutory sentencing guidelines. *See* Wash. Rev. Code § 9.94A.120(1), (2) (2000). To accept the logic employed by the Washington courts would truly render *Apprendi* "a meaningless and formalistic rule of statutory drafting." *Ring*, 536 U.S. at 604. A state could avoid *Apprendi* entirely simply by enacting a statute providing that punishments for non-capital felonies may never exceed life imprisonment.[5]

---

[5] Accordingly, the Washington Supreme Court's reliance on *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), is misplaced. *See*

Apprendi does not and cannot condone such an absurd result. Rather, "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Id.* at 602 (citing *Apprendi*, 530 U.S. at 482-83). Washington law expressly provides that Petitioner's sentence in excess of the statutory guideline range was contingent on the finding of aggravating circumstances. Thus, those circumstances must be found by a jury beyond a reasonable doubt.

II. State Courts Have Split Over the Application of *Apprendi* to Upward Departures from Statutory Sentencing Ranges, and this Issue Affects States Throughout the Country.

The Washington court's refusal to apply *Apprendi* to upward departures from statutorily imposed sentencing guidelines directly conflicts with the holding of the Kansas Supreme Court in *State v. Gould*, 23 P.2d 801 (Kan. 2001). The sentencing schemes in Washington and Kansas are structurally identical:

(1) Both contain a statutorily imposed sentencing grid that establishes presumptive sentencing ranges;

Gore, 143 Wn.2d at 314. *Apprendi* expressly limited *McMillan* to "cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict." *Apprendi*, 530 U.S. at 487 n.13. Here, absent aggravating factors, Petitioner's statutory maximum was the top of the sentencing guidelines range (53 months). Because the court imposed a sentence of 90 months, this case ***does*** "involve the imposition of a sentence more severe than the statutory maximum established by the jury verdict." *Id.*

(2) Both condition any upward departure from the standard range on a finding of one or more aggravating factors;

(3) Both provide that such aggravating factors must be substantial, compelling, and not already included in the elements of the underlying offense; and

(4) Both provide additional statutory limits on the total sentence that may be imposed when the court departs from the standard guidelines range.

See Petition for Certiorari ("Pet.") 9.

The Washington Supreme Court found that upward departures from the presumptive sentencing range did not implicate *Apprendi*. *See Gore*, 143 Wn.2d at 311-15. The Kansas Supreme Court, however, required that the aggravating factors underlying such a departure must be proven to a jury beyond a reasonable doubt. *See Gould*, 23 P.3d at 812-13. The Kansas court reasoned that "[u]nder *Apprendi*, it does not matter how the required finding is labeled, but whether it exposes the defendant to a greater punishment than that authorized by the jury's verdict." *Id.* (citing *Apprendi*, 530 U.S. at 469, 490-96). Where the existence of aggravating factors has not been decided by a jury beyond a reasonable doubt, the only "authorized" sentence is the one set forth in the presumptive sentencing grid. *See id.* at 813. In that situation, the court violates *Apprendi* if it imposes a sentence "beyond the maximum sentence in the applicable grid box." *Id.*

The split between Kansas and Washington is irreconcilable. Despite the identical structures of each state's sentencing scheme and mutual reliance on *Apprendi*, a

Kansas defendant may not be sentenced in excess of the standard range unless a jury has found aggravating factors beyond a reasonable doubt, whereas a Washington defendant may receive an upward departure based solely on a judge's finding by a preponderance of the evidence.

The importance of this issue extends beyond Kansas and Washington. Numerous other states have sentencing guideline ranges that are mandatory unless aggravating factors are found. *See* Pet. 16-17 & n.7. Still more states have sentencing schemes that raise similar issues under *Apprendi*, even though they have not codified sentencing guidelines per se. *Compare People v. Swift*, 781 N.E.2d 292 (Ill. 2002) (holding that sentence for first degree murder could not exceed 60 years under *Apprendi*, even though statute allowed longer sentences if certain aggravating factors were present, because jury had not found that such factors existed), *cert. denied*, 123 S. Ct. 1803 (2003), *with People v. Rivera*, 62 P.3d 1056 (Colo. App. 2002) (holding that *Apprendi* does not apply to a court's finding of "extraordinary aggravating factors" under Colorado law and declining to follow *Gould*).

Moreover, several other states are considering adopting sentencing guidelines. *See, e.g., Justice Pushes Indigent Defense*, Augusta Chronicle, Feb. 1, 2003, at B6 (noting that both the Chief Justice of the Georgia Supreme Court and the Governor of Georgia have asked Georgia judges to consider uniform sentencing guidelines proposed recently by a blue-ribbon state commission); *Cut Prison Costs Without Jeopardizing Public Safety*, Roanoke Times & World News, Jan. 23, 2003, at A12 (noting the Governor of Virginia's proposal to create sentencing guidelines); Richard Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 St. Louis U. L.J. 425, 427 (2000) (noting that at least eight jurisdictions were considering adopting guidelines). Guidance from this Court on how

Apprendi affects the operation of sentencing guidelines will be critically important for these states as well.

Only this Court can resolve the conflict over *Apprendi*'s effect on upward departures from state statutory sentencing guidelines. This issue is a pure question of law concerning the scope of *Apprendi*, and there is nothing to be gained by delaying a final resolution. Allowing the present uncertainty to continue will only aggravate the level of confusion among the practitioners, defendants, judges, and lawmakers who must confront *Apprendi* on a regular basis.

III. Applying *Apprendi* to Upward Departures from *Statutory* State Sentencing Guidelines Would Not Invalidate the Federal Sentencing Guidelines, Which are Promulgated by an Independent Commission Within the Judicial Branch.

The rule set forth in *Apprendi* is confined to facts "that increase the penalty for a crime beyond the prescribed ***statutory*** maximum." *Apprendi*, 530 U.S. at 490 (emphasis added). Thus, this Court has so far limited *Apprendi* to sentencing ranges that are established by legislative acts. *See id.* ("It is unconstitutional for a ***legislature*** to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.") (emphasis added); *id.* at 481 (noting that judges have historically "exercise[d] discretion . . . in imposing a judgment within the range prescribed by ***statute***") (emphasis added).

Washington's sentencing guidelines are established by statute. *See* Wash. Rev. Code § 9.94A.310 (2000). Therefore, *Apprendi* squarely governs sentences that exceed the maximums set by those guidelines. The sentencing ranges in the federal Sentencing Guidelines, on the other hand, are not statutory and are not set by the legislature.

Rather, the federal guidelines are established by the United States Sentencing Commission, an "'independent commission in the judicial branch of the United States.'" *Mistretta v. United States*, 488 U.S. 361, 368 (1989) (quoting 28 U.S.C. § 991(a)).

Because the federal guidelines are the product of "an independent rulemaking body . . . within the Judicial Branch," *id.* at 385, the federal guidelines do not establish "statutory maximum[s]" for purposes of *Apprendi*. 530 U.S. at 490. Thus, deciding that *Apprendi* applies to upward departures from state ***statutory*** sentencing guidelines would not usurp the federal court's role in making findings under the federal sentencing guidelines. This Court may properly leave that latter issue—whether *Apprendi* applies to the federal sentencing guideline ranges—for a later day.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and hold that *Apprendi* applies to upward departures from statutory sentencing guidelines, where such departures are expressly conditioned on the finding of aggravating factors.

Respectfully submitted,

David M. Porter
Counsel of Record
National Association of
Criminal Defense Lawyers
1150 18th Street, N.W.
Suite 950
Washington, DC 20036
(202) 872-8600

Adam N. Steinman
Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
(206) 583-8888

Mary Price
Families Against Mandatory
Minimums
1612 K Street, N.W., Suite 700
Washington, DC 20006
(202) 822-6700

June 9, 2003

Supreme Court, U.S.
FILED
DEC 3 - 2003
OFFICE OF THE CLERK

No. 02-1632

IN THE

Supreme Court of the United States

RALPH HOWARD BLAKELY, JR.,

Petitioner,

—v.—

STATE OF WASHINGTON,

Respondent.

ON WRIT OF CERTIORARI TO THE WASHINGTON COURT OF APPEALS, DIVISION III

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, IN SUPPORT OF PETITIONER

JAMES E. LOBSENZ
(*Counsel of Record*)
Carney Badley Spellman, P.S.
700 Fifth Avenue, Suite 5800
Seattle, Washington 98104
(206) 622-8020

NANCY L. TALNER
AARON H. CAPLAN
American Civil Liberties Union
of Washington
705 Second Avenue, Suite 300
Seattle, Washington 98104
(206) 624-2184

STEVEN R. SHAPIRO
American Civil Liberties
Union Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI* 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. THIS CASE FALLS SQUARELY WITHIN THE RULE OF *APPRENDI* AND *RING* 6

II. REVERSAL OF THE SENTENCE IS CONSISTENT WITH THE CONSTITUTIONAL VALUES ANIMATING *APPRENDI* AND *RING* 9

III. APPLYING *APPRENDI* AND *RING* TO THIS CASE WILL AVOID SEVERELY INCREASED SENTENCES BASED SOLELY UPON JUDICIALLY FOUND FACTS WITHOUT IMPOSING UNMANAGEABLE BURDENS ON THE STATE 14

CONCLUSION 19

TABLE OF AUTHORITIES

Cases:

Accord Taylor v. Louisiana,
419 U.S. 522 (1975) 12

Apprendi v. New Jersey,
530 U.S. 466 (2000) ..... passim

Callan v. Wilson,
127 U.S. 540 (1888) 13

Duncan v. Louisiana,
391 U.S. 145 (1968) ..... passim

Harris v. United States,
536 U.S. 545 (2002) 8

McMillan v. Pennsylvania,
477 U.S. 79 (1986) 8

Mistretta v. United States,
488 U.S. 361 (1989) 7

Republican Party of Minnesota v. White,
536 U.S. 765 (2002) 12

Rex v. Wilkes,
95 Eng. Rep. 737 (C.P. 1763) 10

Ring v. Arizona,
536 U.S. 584 (2002) ..... passim

State v. Argo,
81 Wn. App. 552, 915 P.2d 1103 (1996) 16

State v. Armstrong,
106 Wn.2d 547, 723 P.2d 1111 (1986) 15

State v. Becker,
132 Wn.2d 54, 935 P.2d 1321 (1997) 17

State v. Branch,
129 Wn.2d 635, 919 P.2d 1228 (1996) 14

State v. Burkins,
94 Wn. App. 677, 973 P.2d 15 (1999) 15

State v. Caldera,
66 Wn. App. 548, 832 P.2d 139 (1992) 16

State v. Creekmore,
55 Wn. App. 852, 783 P.2d 1068 (1989) 16

State v. Gore,
143 Wn.2d 288, 21 P.2d 252 (2001) 3

State v. Handley,
115 Wn.2d 275, 796 P.2d 1266 (1990) 15

State v. Lindahl,
114 Wn. App. 1, 56 P.3d 589 (2002) 15

State v. Mejia,
111 Wn.2d 892, 766 P.2d 454 (1989) 15

State v. Nass,
76 Wn.2d 368, 456 P.2d 347 (1969) 17

State v. Negrete,
72 Wn. App. 62, 863 P.2d 137 (1993) 16

State v. Oxborrow,
106 Wn.2d 525, 723 P.2d 1123 (1986) 14

State v. Ritchie,
126 Wn.2d 388, 894 P.2d 1308 (1995) 14, 16

State v. Ross,
71 Wn. App. 556, 861 P.2d 473 (1994) 16

State v. Smith,
82 Wn. App. 153, 916 P.2d 960 (1996) 15

State v. Stewart,
125 Wn.2d 893, 890 P.2d 457 (1995) 15

State v. Tongate,
93 Wn.2d 751, 613 P.2d 121 (1980) 5, 17

Taylor v. Louisiana,
419 U.S. 522 (1975) 12

Wilkes v. Wood,
98 Eng. Rep. 489 (C.P. 1763) 10

Statutes:

RCW 9.94A.120(1)-(2) 2

RCW 9.94A.120(2)-(3) 2

RCW 9.94A.120(14) 2

RCW 9A.20.121 2

RCW 9.94A.310 ..... 2, 6, 17

RCW 9.94A.370 2

RCW 9.94A.390 3

RCW 9.94A.400 2

RCW 9.94A.505 2

RCW 9.95.040 17

RCW 69.33.410 17

RCW 69.50.435 17

Other Authorities:

The Works of John Adams (C. Adams ed. 1850) 4, 10

H. Black, *The Bill of Rights*, 35 N.Y.U.L.REV. 865
(1960) 10

A. De Tocqueville, Democracy in America
(Vintage ed. 1945) 13

Journals of the Continental Congress (Ford ed.) 9

Letters from The Federal Farmer (IV),
2 The Complete Anti-Federalist (H. Storing ed.
1981) 9

Letters of Centinel,
2 The Complete Anti-Federalist (H. Storing ed.
1981) 11, 12

*Letter from Thomas Jefferson to Abbe Arnoux (July
19, 1789), reprinted in 15 J. Boyd, The Papers of
Thomas Jefferson (1958)* 10

1 J. Stephen, A History of the Criminal Law of
England (1883) 10

INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 400,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Washington is one of its statewide affiliates. Since its founding in 1920, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus* curiae. Because this case calls into question the meaning and scope of the jury trial right, both as a means to protect against arbitrary government action and to preserve public confidence in the criminal justice system, it raises questions of fundamental importance to the ACLU and its members.

STATEMENT OF THE CASE

Petitioner Ralph Blakely pled guilty in state court to one count of second degree kidnapping while armed with a deadly weapon and one count of second degree assault. He was sentenced to 90 months in prison, 37 months longer than the maximum sentencing range authorized for his crimes by the Washington State legislature.

Under Washington's Sentencing Reform Act of 1981 (the "Act"), the legislature has established a "standard" sentencing range for every felony conviction. The standard sentencing range reflects the legislature's judgment regarding the seriousness of both the offense and the offender's criminal

---

[1] Pursuant to Rule 37.6, letters of consent to the filing of this brief are on file with the Court. No counsel for either party to this matter authored this brief in whole or in part. Furthermore, no persons or entities, other than the *amici* themselves, made a monetary contribution to the preparation or submission of this brief.

history. See RCW 9.94A.310 (recodified as RCW 9.94A.505).[2]

The Act therefore provides that a sentencing court "shall impose" a sentence within the standard range unless the court finds substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.120(1)-(2). The Act contains an illustrative list of aggravating factors that may supply a legal basis for an exceptional sentence above the standard range. However, the court may also rely on factors not listed in the statute to impose an exceptional sentence above the range. The sentencing judge, without a jury, determines by a preponderance of the evidence whether the facts support an aggravating factor. RCW 9.94A.120(2)-(3) and RCW 9.94A.370. An upward departure may not exceed the maximum for the class of felony involved. RCW 9.94A.120(14). Both second degree kidnapping and second degree assault are Class B felonies that carry a maximum sentence of ten years. RCW 9A.20.121.

Petitioner Blakely's standard range for the kidnapping offense was 49 to 53 months, and the standard range for the assault offense was 12 to 14 months. Under Washington law these sentences presumptively run concurrently. RCW 9.94A.400. In exchange for Blakely's guilty pleas, the prosecution recommended a sentence at the high end of the standard range. The sentencing judge rejected this recommendation, added an additional 37 months to the top of the standard range, and imposed an exceptional sentence of 90 months on the kidnapping charge, to run concurrently with a 14 month sentence on the assault charge. This upward departure was based upon judicial findings that the following two statutory aggravating factors were present: "deliberate cruelty," and "domestic violence plus deliberate cruelty and commission within the sight or sound of the victim's minor child." RCW 9.94A.390(2)(a) and RCW 9.94A.390(2)(h)(ii) and (iii).

Blakely contended that this increased sentence violated the holding of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because the judge's factual findings exposed him to a penalty greater than he could lawfully receive if punished according to the facts established by his guilty plea. Accordingly, Blakely claimed he was entitled to a jury trial at which the additional facts would have to be established by proof beyond a reasonable doubt. The Washington courts disagreed, relying on the Washington Supreme Court decision in *State v. Gore*, 143 Wn.2d 288, 21 P.3d 252 (2001), which held that *Apprendi* did not apply to exceptional sentences above the standard range.

This Court granted review to decide whether a fact (other than a prior conviction) necessary for an upward departure from a statutory standard sentencing range must be proved according to the procedures mandated by *Apprendi*.

SUMMARY OF ARGUMENT

Washington State courts have held that the rule of *Apprendi v. New Jersey*, 530 U.S. 466, does not apply in a significant class of cases where the severity of punishment above the statutorily prescribed range hinges on the presence or absence of a disputed fact. In Blakely's case, the facts encompassed in his guilty plea (or that a jury would have been required to find in order to convict) permitted a sentence of between 49 and 53 months, but the sentence that Blakely actually received was two-thirds longer, based upon proof of additional facts that were found by a judge not a jury, and by a preponderance of the evidence rather than beyond a reasonable doubt. This result fundamentally misreads *Apprendi* and is

---

[2] Many of the provisions of the Sentencing Reform Act were recodified by the Laws of 2001, ch. 10, § 6. This *amicus curiae* brief employs the old statutory section numbers, as did the courts below.

irreconcilable with this Court's post-*Apprendi* decision in *Ring v. Arizona,* 536 U.S. 584 (2002).

Blakely was sentenced to a longer term in prison than the relevant statute otherwise allowed based on his guilty plea. Washington's sentencing scheme is therefore indistinguishable from the New Jersey sentencing scheme struck down in *Apprendi.* Following *Apprendi,* any facts (other than a prior conviction) that subject a defendant to a longer sentence than provided by statute in the absence of such facts must be found by a jury beyond a reasonable doubt. A state cannot sidestep these constitutional safeguards merely by re-labeling them as sentencing factors. As the Court stressed in *Apprendi:* "We have made clear beyond peradventure that *Winship's* due process and associated jury protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence." *Id.* at 484. Blakely does not ask this Court to expand *Apprendi*, only to apply it.

Reversing Blakely's exceptional sentence is consistent with the constitutional values that motivated the Sixth Amendment right to jury trial and the decisions in *Apprendi* and *Ring.* Denial of the right to a jury trial was one of the Framers' chief complaints. "Royal interference with the jury trial was deeply resented." *Duncan v. Louisiana*, 391 U.S. 145, 152 (1968). The Declaration of Independence itself voiced objections to the King's practice of "depriving us in many cases, of the benefits of Trial by Jury." The decision that juries should have a major responsibility for criminal justice was broadly conceived by the Framers, who believed that "the common people should have as complete a control over the judiciary as over the legislature." 2 The Works of John Adams 253 (C. Adams ed. 1850) (diary entry, Feb. 12, 1771). Incidents where English judges had acceded to tyranny were noteworthy not only for their wrongful findings of guilt, but for the severe consequences of those guilty verdicts. The Framers

concluded that such punishments should not be imposed based upon the arbitrary action of a single judge. The jury trial provision of the Sixth Amendment thus reflects a fundamental "reluctance to entrust plenary powers over the life and liberty of citizens to one judge or to a group of judges." *Duncan*, 391 U.S. at 156. In addition, citizen participation as jurors is essential for the maintenance of public confidence in the judicial branch of government. The Framers considered the jury to be an important institution for instilling republican and political virtues in a self-governing people. A system where a jury finds only a portion of the facts that the legislature deems significant to the length of the sentence represents an incursion into the democratizing role of the jury.

Insisting that Washington Courts adhere to *Apprendi* will not place unmanageable burdens on the state. Exceptional sentences above the standard statutory range are rare, so complying with *Apprendi* would not open the floodgates to thousands of sentencing trials. It would, however, correct a deprivation of jury trial rights that has severe consequences for defendants when it arises. In numerous cases, Washington's elected judges have single-handedly imposed exceptional sentences that multiply the statutorily-established sentence many times over, for years of additional incarceration.

These departures are particularly unjust because Washington State is already well-equipped to handle jury findings beyond a reasonable doubt on facts which increase the sentence beyond the standard range. Cases applying different Washington criminal statutes are already consistent with *Apprendi.* Indeed, 20 years before *Apprendi,* the Washington Supreme Court held, "our cases involving other enhanced punishment statutes uniformly require proof beyond a reasonable doubt to establish the facts which, if proved, will increase a defendant's penalty." *State v. Tongate*, 93 Wn.2d 751, 754, 613 P.2d 121 (1980) (interpreting firearms enhancement statute). The *Apprendi* concept is plainly not

alien to Washington criminal law. The practical impact of this case would be to apply its reasoning across the board to all facts (other than a prior conviction) which increase the punishment above the statutory range, rather than the current system where *Apprendi* procedures are used only in a seemingly random selection of criminal statutes. The formalities of statutory labeling cannot contravene the important constitutional principle that such facts must be found by a jury and must be established by proof beyond a reasonable doubt. As stated in *Ring*, the *Apprendi* rule must not be "reduced to a 'meaningless and formalistic' rule of statutory drafting." 536 U.S. at 604.

ARGUMENT

I. THIS CASE FALLS SQUARELY WITHIN THE RULE OF *APPRENDI* AND *RING*

In Blakely's case, the facts encompassed in his guilty plea (or that a jury would have been required to find in order to convict) permitted a sentence of between 49 and 53 months. RCW 9.94A.310. The sentence that Blakely actually received was two-thirds longer. Under Washington law, this increased sentence could be imposed only upon proof of additional facts. As this case illustrates, however, those facts can be found by a judge not a jury, and by a preponderance of the evidence rather than beyond a reasonable doubt. The Washington State courts have held that *Apprendi* does not apply in these circumstances. That conclusion fundamentally misreads *Apprendi*. It is also irreconcilable with this Court's post-*Apprendi* decision in *Ring v. Arizona*, 536 U.S. 584.

Because petitioner's brief will discuss *Apprendi* at length, we will not repeat that discussion here. For present purposes, it is sufficient to note that Washington continues to approach Blakely's jury trial claim by elevating form over substance, while this Court has taken precisely the opposite

approach in both *Apprendi* and *Ring*. Thus, Washington places great weight on the fact that the 90 month sentence that Blakely received was less than the 10 year sentence authorized for Class B felonies, including second degree kidnapping and second degree assault. But that simple assertion obscures the fact that the legislature also established a standard sentencing range that capped Blakely's maximum sentence at 53 months absent a separate finding of aggravated circumstances.[3]

Blakely, like Apprendi, was therefore sentenced to a longer term in prison than the relevant statute otherwise allowed based on his guilty plea. Washington's decision to allow a longer sentence based on additional findings does not resolve the constitutional problem, it merely frames it. Indeed, on this critical issue, Washington's sentencing scheme is indistinguishable from the New Jersey sentencing scheme struck down in *Apprendi*. Following *Apprendi*, any facts that subject a defendant to a longer sentence than provided by statute in the absence of such facts must be found by a jury beyond a reasonable doubt. Nor can a state sidestep these constitutional safeguards – that *Apprendi* described as "constitutional protections of surpassing importance," 530 U.S. at 476 – merely by re-labeling them as sentencing factors. As the Court stressed in *Apprendi*: "We have made clear beyond peradventure that *Winship's* due process and associated jury protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length

---

[3] As Blakely's petition for certiorari also points out, Washington's sentencing guidelines are set by the legislature. By contrast, the federal sentencing guidelines are established by a sentencing commission that is part of the judicial branch. See *Mistretta v. United States*, 488 U.S. 361 (1989). Thus, an upward departure under the federal guidelines can still remain with the sentencing parameters set by Congress. Washington, in effect, has created two sentencing ranges and the jump from one to the other necessarily depends on the finding of additional facts. At the very least, therefore, Washington's sentencing scheme raises different Sixth Amendment questions than the federal sentencing scheme.

of his sentence." *Id.* at 484.[4] Indeed, the history behind cases interpreting the right to a jury trial compelled the *Apprendi* Court to require that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490.

The importance of having a jury determine aggravating facts beyond a reasonable doubt when those facts permit a sentence beyond the statutorily-prescribed range was reaffirmed in *Ring v. Arizona,* 536 U.S. 584. As in *Apprendi*, the Court in *Ring* found that the Sixth Amendment right to a jury trial was violated when the judge alone determined the facts used to increase the sentence beyond the facts reflected in the jury verdict. 536 U.S. at 602. *Ring* explained why it was essential for a jury to perform this factfinding role:

> Arizona suggests that judicial authority over the finding of aggravating factors 'may... be a better way to guarantee against the arbitrary imposition of the death penalty.' The Sixth Amendment jury trial right, however, does not turn on the relative rationality, fairness, or efficiency of potential factfinders. Entrusting to a judge the finding of facts necessary to support a death sentence might be 'an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State... The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free.'

Ring, 536 U.S. at 607 (citations omitted). Blakely does not ask this Court to expand *Apprendi*, only to apply it to the portions of Washington's sentencing scheme that fail to conform to it.

II. REVERSAL OF THE SENTENCE IS CONSISTENT WITH THE CONSTITUTIONAL VALUES ANIMATING *APPRENDI* AND *RING*

Denial of the right to a jury trial was one of the Framers' chief complaints. "Royal interference with the jury trial was deeply resented." *Duncan v. Louisiana*, 391 U.S. 145, 152 (1968). Thomas Jefferson complained that Parliament had "extended the jurisdiction of the courts of admiralty beyond their ancient limits thereby depriving us of the inestimable right of trial by jury in cases affecting both life and property and subjecting both to the arbitrary decision of a single and independent judge." 2 *Journals of the Continental Congress (Ford ed.)* 132. And, the Declaration of Independence voiced objections to the King's practice of "depriving us in many cases, of the benefits of Trial by Jury."

The decision that juries should have a major responsibility for criminal justice was broadly conceived by the Framers. For example, the "Federal Farmer," the leading Anti-Federalist essayist of the ratification period, wrote that it was through juries "frequently drawn from the body of the people... [that] we secure to the people at large, their just and rightful controul in the judicial department." *Letters from The Federal Farmer (IV)* in 2 The Complete Anti-Federalist, at 249 (H.

---

[4] The qualifications on that general principle have no bearing here. For example, in *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986), the Court held that the factual findings necessary to impose a mandatory minimum need not be submitted to a jury after a guilty plea because they fall within an "already available" range set by the legislature. Here, by contrast, the increased sentence given to Blakely was not within the range of statutory alternatives that was "already available" to the sentencing court based solely on his guilty plea. *See also Harris v. United States,* 536 U.S. 545 (2002). Nor can the factual findings in this case be compared to a prior conviction, which is a matter of public record.

Storing ed. 1981). John Adams asserted that "the common people should have as complete a control over the judiciary as over the legislature." 2 The Works of John Adams 253 (C. Adams ed. 1850) (diary entry, Feb. 12, 1771). Jefferson considered the importance of citizen participation in government as jurors *more* important that citizen participation in the legislative branch of government: "Were I called upon to decide whether the people had best be omitted in the Legislative or Judicial department, I would say it is better to leave them out of the Legislative." *Letter from Thomas Jefferson to Abbe Arnoux (July 19, 1789),* reprinted in 15 J. Boyd, The Papers of Thomas Jefferson at 282-83 (1958).

The Framers were quite aware of the fact that English judges had all too often acceded to instances of government tyranny, as the cases of William Prynne[5] and John Wilkes[6] graphically illustrated. These cases were noteworthy not only for their findings of guilt, but for the severe consequences of those guilty verdicts. The celebrated jury acquittal of the printer John Peter Zenger, tried for seditious libel, was well known to the Framers, and was cherished as an example of the way in which juries acted as a check against government oppression. During the debate on the adoption of the Constitution, one essayist wrote: "If I use my pen with the boldness of a freeman, it is because I know that the liberty of

[5] Convicted of the crime of writing seditious books and pamphlets, Prynne's "ears were first cut off by court order and . . . subsequently, by another court order . . . his remaining ear stumps [were] gouged out while he was on a pillory." H. Black, *The Bill of Rights*, 35 N.Y.U.L.REV. 865, 870 (1960). *See* 1 J. Stephen, A History of the Criminal Law of England 340-341 (1883).

[6] A member of Parliament, Wilkes had written pamphlets criticizing George III's ministry and majesty. The government reacted by issuing general warrants to seize his books and pamphlets, and had Wilkes seized and imprisoned in the Tower of London. *See Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763), and *Rex v. Wilkes*, 95 Eng. Rep. 737 (C.P. 1763).

the press yet remains unviolated, and juries yet are judges." *Letters of Centinel (I)* in 2 The Complete Anti-Federalist, *supra* at 136.

More recently, Justice Scalia observed in *Apprendi*, that judges "are part of the State," and "[t]he founders of the American Republic were not prepared to leave [criminal justice] to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights." 530 U.S. at 498 (Scalia, J., concurring). The *Apprendi* majority expressed a similar view.

> '[T]o guard against a spirit of oppression and tyranny on the part of rulers,' and 'as the great bulwark of [our] civil and political liberties,' 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873), trial by jury has been understood to require that '*the truth of every accusation,* whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours....' 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) (hereinafter Blackstone) (emphasis added).

Id. at 477.

Duncan v. Louisiana, 391 U.S. 145, likewise recognized that the Sixth Amendment right to a jury trial was intended to protect criminal defendants against judges who might be "too responsive to the voice of higher authority." *Duncan, supra,* 391 U.S. at 156. Guaranteeing the right of the accused to be tried by a jury of his peers gave the accused a safeguard against the arbitrary action of "the compliant, biased, or eccentric judge." *Id.* The jury trial provision of the Sixth

Amendment thus reflects a fundamental "reluctance to entrust plenary powers over the life and liberty of citizens to one judge or to a group of judges." *Id. Accord Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (purpose of jury is "to make available the commonsense judgment of the community . . . in preference to the professional or perhaps overconditioned or biased response of a judge.").

Washington elects its judges, Washington Const., Art. IV, §§ 3, 5, 29, 30, and being tough on criminals is often politically popular. As Justice O'Connor noted in *Republican Party of Minnesota v. White,* 536 U.S. 765, 788-89 (2002)(concurring opinion): "We of course want judges to be impartial, in the sense of being free from any personal stake in the outcome of the cases to which they are assigned. But if judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case. Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects." By adopting the Sixth Amendment, the Framers insisted that "[i]f the defendant preferred the common sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of a single judge, he was to have it." *Duncan,* 391 U.S. at 16.

Citizen participation as jurors, moreover, is essential for the maintenance of public confidence in the judicial branch of government. "Community participation in the administration of the criminal law . . . is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system." *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). The right to trial by jury "preserves in the hands of the people, that share which they ought to have in the administration of justice." *Letters of Centinel (II)* in 2 The Complete Anti-Federalist, *supra* at 149. The Framers also considered the jury to be an important institution for instilling republican and political virtues in a

self-governing people. Alexis de Tocqueville, a keen observer of the American constitutional system, observed that "the jury, which is the most energetic means of making the people rule, is also the most efficacious means of teaching it how to rule well." A. De Tocqueville, Democracy in America 297 (Vintage ed. 1945). A system where a jury finds only a portion of the facts that the legislature deems significant to the length of sentence represents an incursion into the democratizing role of the jury.

The right to trial by jury has always been concerned with both the finding of guilt and the severity of sentence. Certain minor or petty offenses may be prosecuted summarily without a jury. *Apprendi,* 530 U.S. at 480, n.7; *Callan v. Wilson*, 127 U.S. 540 (1888) (jury trial right does not apply to a "fine only, or imprisonment in the county jail for a brief and limited period."). However, once a threshold of severity is crossed, full jury trial rights are demanded. *Duncan*, 391 U.S. at 162 (requiring jury trial for any offense carrying a possible penalty above six months imprisonment). As this Court stated in *Ring*, "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." 536 U.S. at 609. In precisely the same fashion, the right to trial by jury would be senselessly diminished if it encompassed factfinding necessary to impose a sentence of six months under *Duncan*, but not the factfinding necessary to increase the defendant's sentence 37 months beyond the statutorily prescribed range.

III. APPLYING *APPRENDI* AND *RING* TO THIS CASE WILL AVOID SEVERELY INCREASED SENTENCES BASED SOLELY UPON JUDICIALLY FOUND FACTS WITHOUT IMPOSING UNMANAGEABLE BURDENS ON THE STATE

While exceptional sentences are not common in Washington, when they are imposed they are often extremely large. Upward departures of several years are not at all unusual. For example, in *State v. Oxborrow*, 106 Wn.2d 525, 723 P.2d 1123 (1986), the defendant pled guilty to first degree theft and willful violation of a cease and desist order concerning the sale of securities. The standard range sentences for these crimes were 0-3 months and 0-12 months respectively. The sentencing judge found several aggravating factors and imposed consecutive prison sentences of 10 years and 5 years for a total term of 15 years. *Id.* at 528. The facts established by Oxborrow's guilty plea only authorized a sentence of at most one year in jail; the facts found by the sentencing judge led to the imposition of an additional 14 years of imprisonment. Although Oxborrow argued for adoption of a rule that would presumptively limit an upward exceptional sentence to no more than twice the top of the standard range, the Washington Supreme Court declined to adopt such a rule, 106 Wn.2d at 531, and affirmed a sentence that was fifteen times the top of the standard range.

Other examples of large upward departures based upon judicially found facts abound.

- *State v. Branch*, 129 Wn.2d 635, 919 P.2d 1228 (1996) (4 year prison sentence imposed by judge for first degree theft where top of standard range was 3 months)

- *State v. Ritchie*, 126 Wn.2d 388, 894 P.2d 1308 (1995) (75 year sentence for murder imposed on defendant Scott where top of standard range was 26-2/3 years; 26 year sentence for first degree rape of a child imposed on defendant Ritchie where top of standard range was 5-2/3 years; 7 year sentence for second degree assault imposed on defendant Hamrick where top of standard range was 9 months)

- *State v. Stewart*, 125 Wn.2d 893, 890 P.2d 457 (1995) (20 year sentence imposed for attempted kidnapping where top of range was 10 years)

- *State v. Handley*, 115 Wn.2d 275, 796 P.2d 1266 (1990) (6 years 9 months imposed for conspiracy to commit robbery where top of the range was 3 years and four and a half months)

- *State v. Mejia*, 111 Wn.2d 892, 766 P.2d 454 (1989) (30 month sentence imposed for possession of cocaine with intent to deliver where top of standard range was 14 months)

- *State v. Armstrong*, 106 Wn.2d 547, 723 P.2d 1111 (1986) (5 year sentence imposed for second degree assault where top of standard range was 14 months)

- *State v. Lindahl*, 114 Wn. App. 1, 56 P.3d 589 (2002) (27-1/2 year sentence imposed for second degree felony murder where top of standard range was 18-1/3 years)

- *State v. Burkins*, 94 Wn. App. 677, 973 P.2d 15 (1999) (60 year sentence imposed for first degree murder where top of standard range was 27-3/4 years)

- *State v. Smith*, 82 Wn. App. 153, 916 P.2d 960 (1996) (100 year sentence imposed for attempted murder, rape, robbery and kidnapping was 3.1 times the top of the standard range)

- *State v. Argo*, 81 Wn. App. 552, 915 P.2d 1103 (1996) (10 year sentence imposed for securities fraud where top of standard range was 4 years, ten months)

- *State v. Negrete*, 72 Wn. App. 62, 863 P.2d 137 (1993) (5 year sentence for delivery of cocaine imposed where top of standard range was 2 years, 10 months)

- *State v. Ross*, 71 Wn. App. 556, 861 P.2d 473 (1994) (70 year sentence for second degree murder where top of standard range was 24 years)

- *State v. Caldera*, 66 Wn. App. 548, 832 P.2d 139 (1992) (4 year sentence imposed for delivery of cocaine where top of standard range was 2 years, 3 months)

- *State v. Creekmore*, 55 Wn. App. 852, 783 P.2d 1068 (1989) (60 year sentence imposed for second degree felony murder where top of standard range is 16 years).

It should be noted that while some upward departures like the ones listed above are extremely long, the frequency with which exceptional sentences outside the standard range are imposed in Washington State is actually quite low. In *Ritchie*, the majority pointed to statistics indicating that exceptional sentences above the range were only imposed in 2.05% of all adult felony cases. *Id.* at 397. [7] Echoing this point, the dissenting justices in *Ritchie* observed that there were only 298 exceptional sentences imposed statewide in 1994. *Id.* at 413-14. Thus, complying with the requirements of *Apprendi* would not open the floodgates to thousands of sentencing trials. Moreover, many cases would be resolved by plea bargaining in light of the correct constitutional standard.

[7] *Ritchie* held that sentencing judges were not required to articulate reasons for the length of their upward departures. 126 Wn..2d at 394-95.

In any event, Washington State is already well-equipped to handle jury findings beyond a reasonable doubt on facts that increase the legislatively prescribed sentence beyond the standard range. The statutes involved in Blakely's case gave a single judge the power to extend Blakely's sentence beyond the legislatively prescribed range. However, other comparable sentencing statues in Washington function in a manner that is consistent with *Apprendi*. For example, under Washington law a judge can impose an increased sentence if the defendant or an accomplice was armed with a gun or other deadly weapon, but the defendant has a right to have a jury determine those facts beyond a reasonable doubt. RCW 9.94A.310. Indeed, 20 years before *Apprendi*, the Washington Supreme Court held, "our cases involving other enhanced punishment statutes uniformly require proof beyond a reasonable doubt to establish the facts which, if proved, will increase a defendant's penalty." *State v. Tongate*, 93 Wn.2d 751, 754, 613 P.2d 121 (1980) (interpreting firearms enhancement in RCW 9.95.040).

The same jury trial right applies to the facts used to increase the sentence range for commission of a drug offense in a school zone or within certain other protected areas. RCW 9.94A.310 and RCW 69.50.435. *See e.g., State v. Becker*, 132 Wn.2d 54, 935 P.2d 1321 (1997) (jury, not judge, should determine whether a GED program in an office building is a "school"). In a case involving an enhanced sentence if a sale of narcotics was to a minor, Washington's rule is that "where a factor aggravates an offense and causes the defendant to be subject to a greater punishment than would otherwise be imposed, the issue of whether that factor is present must be presented to the jury upon proper allegations and a verdict thereon rendered before the court can impose the harsher penalty." *State v. Nass*, 76 Wn.2d 368, 370, 456 P.2d 347 (1969) (interpreting RCW 69.33.410).

The *Apprendi* concept is plainly not alien to Washington criminal law. The practical impact of this case would be to apply its reasoning across the board to all of Washington's sentencing enhancement statutes where punishment beyond the statutory range depends on the existence of facts (other than the fact of prior conviction). This consistency in application of the law is one of *Apprendi*'s many merits.

> New Jersey threatened Apprendi with certain pains if he unlawfully possessed a weapon and with additional pains if he selected his victims because of their race. As a matter of simple justice, it seems obvious that the procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment. Merely using the label "sentencing enhancement" to describe the latter surely does not provide a principled basis for treating them differently.

530 U.S. at 476. As stated in *Ring*, the *Apprendi* rule must not be "reduced to a 'meaningless and formalistic' rule of statutory drafting." 536 U.S. at 604. Washington currently calls some penalty lengthening facts "aggravating factors" and others "enhancements." It uses *Apprendi* procedures for some facts but not others, even though all trigger additional punishment above and beyond that authorized by the statutorily established top of the standard range. *Apprendi* demands that all such facts be proven the same way. The formalities of statutory labeling cannot contravene the important constitutional principle that such facts must be found by a jury and must be established by proof beyond a reasonable doubt.

CONCLUSION

For the reasons stated above, the judgment of the Washington Court of Appeals should be reversed.

Respectfully submitted,

JAMES E. LOBSENZ
(Counsel of Record)
Carney Badley Spellman, P.S.
700 Fifth Avenue, Suite 5800
Seattle, Washington 98104
(206) 622-8020

STEVEN R. SHAPIRO
American Civil Liberties Union Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

NANCY L. TALNER
AARON H. CAPLAN
American Civil Liberties Union of Washington
705 Second Avenue, Suite 300
Seattle, WA 98104
(206) 624-2184

Dated: December 4, 2003

Supreme Court, U.S.
FILED
DEC 4 - 2003

No. 02-1632

IN THE
Supreme Court of the United States

RALPH HOWARD BLAKELY, JR.,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

On Writ of Certiorari to the
Washington Court of Appeals, Division III

JOINT APPENDIX

JOHN D. KNODELL
PROSECUTING ATTORNEY
GRANT COUNTY, WA.
Counsel of Record
TERESA CHEN
P.O. Box 37
Ephrata, WA 98823
(509) 754-2011

JEFFREY L. FISHER
Counsel of Record
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150

Petition for Certiorari Filed May 5, 2003
Certiorari Granted October 20, 2003

TABLE OF CONTENTS

Relevant Docket Entries From the Courts Below 1

Decision of the Washington Court of Appeals..... 2

Superior Court's Judgment and Sentence 24

Superior Court's Findings of Fact and Conclusions of Law re: Exceptional Sentence 40

Oral Ruling of the Superior Court Denying Petitioner's *Apprendi* Motion 51

Order of the Washington Supreme Court Order Denying Review..... 60

Statement of Defendant on Plea of Guilty to a Felony..... 61

Second Amended Information..... 75

RELEVANT DOCKET ENTRIES FROM THE COURTS BELOW

1. Superior Court of Washington for Grant County

a. 10/27/98	Information filed
b. 7/12/00	Amended Information filed
c. 7/18/00	Second Amended Information filed
d. 7/18/00	Guilty plea entered
e. 7/31/00	Motion to withdraw guilty plea denied
f. 7/31/00	Hearing regarding sentencing
g. 7/31/00	Sentencing continued under RCW 9.94A.370
h. 8/28/00	Notice of Appeal filed
i. 10/4/00	Oral ruling denying Petitioner's *Apprendi* motion
j. 10/4/00	Oral ruling denying second motion to withdraw guilty plea
k. 10/4-6/00	Evidentiary hearing on sentencing
l. 11/13/00	Judgment and Sentence
m. 11/13/00	Findings of Fact and Conclusions of Law Regarding Exceptional Sentence

2. Washington Court of Appeals, Division III

a. 4/16/02	Oral Argument
b. 5/23/02	Decision affirming conviction and sentence

3. Washington Supreme Court

a. 6/24/02	Petition for Review filed
b. 2/4/03	Petition for Review denied

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 19545-7-III
	)	
Respondent,	)	
	)	Division Three
v.	)	Panel Six
	)	
HOWARD RALPH BLAKELY,	)	PUBLISHED OPINION
	)	
Appellant.	)	Filed May 23, 2002

SCHULTHEIS, J. -- Howard Ralph Blakely pleaded guilty to one count of second degree kidnapping and one count of second degree assault. Consistent with the plea agreement, the State recommended the high end of the standard range. After a sentencing evidentiary hearing, where the State presented testimony from the victims and mental health professionals, the trial court imposed an exceptional sentence upward. Mr. Blakely now appeals, contending the State violated the plea agreement by advocating for an exceptional sentence. He also challenges the constitutionality of the sentence and the sentencing hearing. Pro se, he claims he had ineffective assistance of counsel and alleges various acts of misconduct by the State. Finding no error, we affirm.

FACTS

Mr. Blakely and Yolanda Blakely were married in 1973. They raised three children: two daughters and their youngest son, Ralphy. The family acquired considerable real property during the marriage, including a home, ranch, and development property in Montana; a home and orchard in Grant County; a lake home; and rental properties. In order to

protect this property from creditors and tax liability, they created a trust known as the Blakely Farms Trust.

In 1995, Ms. Blakely moved to Spokane from Montana, filed for divorce, and obtained a restraining order against Mr. Blakely. One year later, the trustee for the Blakely Farms Trust filed a petition for a declaration of the validity of the trust and for an accounting. In December 1997, the Spokane divorce court authorized Ms. Blakely to move into the Grant County home and to operate the orchard. Her son Ralphy joined her there in June 1998.

On the afternoon of October 26, 1998, about two weeks before the trust litigation was set to begin, Mr. Blakely surprised Ms. Blakely as she walked back from her mailbox. He pushed her to the ground, wrapped duct tape around her mouth and head, and taped her wrists together. Apparently very angry, he told Ms. Blakely he wanted her to dismiss the dissolution and trust proceedings. Noting that O.J. Simpson had gotten away with what he did, Mr. Blakely warned his wife to cooperate or he would kill her and Ralphy. He told her he had many guns, ammunition, and several knives. He then forced her to climb into his pickup canopy, where he locked her in a coffin-like plywood box that he had constructed. The box was about the same width and length as Ms. Blakely's body and had air holes drilled into each end. Ms. Blakely heard her husband loading items from the house into the truck. On several occasions, he opened the lid of the box, pressed a knife blade to Ms. Blakely's neck or nose, and demanded to know where various items could be found. As night fell and it became cold, Mr. Blakely put a quilt over his wife in the box.

Ralphy, age 13, arrived home from football practice after dark. His father met him in the driveway, told him his mother was in great danger, and told him not to cause any trouble. They walked to the pickup, where Ralphy heard his mother yelling from the box. Mr. Blakely ordered Ralphy to

drive his mother's car and warned him that if he "tried anything," Mr. Blakely would shoot the box with a shotgun. Clerk's Papers (CP) at 626.

Mr. Blakely drove the pickup out of the orchard and headed east, with Ralphy following in his mother's car. Eventually they stopped at a truck stop on the outskirts of Moses Lake for gas. When Ralphy and his father entered the truck stop to pay, Ralphy shouted, "Call 9-1-1! Help us! He kidnapped us! He has my mom in a box!" CP at 627. Mr. Blakely tried to drag Ralphy to the car, but truckers shouted to him to leave the boy alone.

He released Ralphy, ran to the pickup, and took off. Ralphy jumped on the pickup bumper and tried to release his mother from the box, but was knocked off when Mr. Blakely accelerated. Ralphy was left behind at the truck stop.

During the subsequent trip to Montana, Mr. Blakely removed the tape from his wife's head and let her sit in the front seat so she could tell any police who stopped them that she was accompanying him of her own free will. He was angry because "Ralphy ruined everything!" CP at 627. On occasion, Mr. Blakely forced Ms. Blakely back into the box. In all, she was locked in the box for over four hours.

They eventually arrived at the house of Mary Gillespie, who lived close to their Montana home. Mr. Blakely let his wife enter Ms. Gillespie's house while he called their older daughter and demanded that she stop the divorce and trust litigation. He also called a stockbroker, received stock quotations, and gave the broker sell orders. Meanwhile, Ms. Blakely and Ms. Gillespie surreptitiously planned to call for help. When Mr. Blakely sent Ms. Gillespie on an errand to a nearby house, she called the police. Officers soon arrived and Mr. Blakely sent his wife out to tell them that she had

come to Montana voluntarily. Instead, she reported that she had been kidnapped, and he was arrested without incident.

Mr. Blakely was charged in federal court with two counts of kidnapping. These charges were later dismissed and the State filed two charges of first degree kidnapping, each involving domestic violence, in October 1998. He pleaded not guilty, with a defense of insanity or diminished capacity.

Mr. Blakely has been diagnosed at various times since 1972 as suffering from schizophrenia. The trial court in the Blakely Farms Trust litigation held a hearing in February 1999 to determine whether the court should appoint a guardian ad litem to represent Mr. Blakely's interests in the trust and dissolution actions. Based on his psychiatric history and a psychologist's recent conclusion that Mr. Blakely suffered "clear mental deficiencies," Def.'s Ex. 2, the civil court appointed a guardian ad litem in early March 1999.

Within days, the State in the criminal action obtained an order for an evaluation at Eastern State Hospital of Mr. Blakely's competency. After reviewing Mr. Blakely's 27-year psychiatric history as well as the results of his current examination, evaluators Dr. Vern Cressey and Dr. Timm Fredrickson concluded that he had high average intelligence, had never been a paranoid schizophrenic, and suffered instead from a severe personality disorder with schizotypal and narcissistic components. Noting his multiple legal difficulties over the years, their report also surmised that Mr. Blakely only sought psychiatric treatment when he was "embroiled in legal issues." CP at 70. On the basis of this evaluation, the criminal trial court entered an order of competency in May 1999.

Because defense counsel continued to have difficulty communicating with Mr. Blakely, the trial court ordered another evaluation in September 1999 to determine whether Mr. Blakely could assist counsel and appreciate the import of

the criminal proceedings. The report from this round of evaluations stated that Mr. Blakely began the stay at Eastern with "elective mutism" and "struggl[ed] to find something wrong with himself physically." CP at 291. In the opinion of the evaluators, he was well aware of the court proceedings--including the options and consequences of various pleas--and he had the capacity to understand and assist in his own defense. Despite the evaluation results, defense counsel demanded a jury trial on the issue of Mr. Blakely's competency to stand trial. Finding that RCW 10.77.090 authorizes a pretrial jury determination of competency, the trial court granted the motion.[1]

The criminal competency trial was held in April 2000. Mr. Blakely's counsel sought to introduce the trust court's order appointing the guardian ad litem. This order included a finding that Mr. Blakely "is not competent at this time [March 1999] to comprehend with understanding and intelligence the significance of the entire legal proceedings and their effect on and relationship to his best interests." Def.'s Ex. 1, at 2. Although the criminal trial court found that the civil court's order was not really an adjudication of incompetence, it decided to allow admission of the order at the competency hearing. Later, when defense counsel objected to the trial court's refusal to instruct the jury that the civil court's order raised a rebuttable presumption of incompetence, the trial court ruled as a matter of law that the order appointing the guardian ad litem did not constitute an adjudication of incompetence. The jury found that Mr. Blakely was competent to stand trial on the criminal charges.

---

[1] RCW 10.77.090(1) provides that the trial court may order a defendant who is suspected to be incompetent to undergo an evaluation for up to 90 days. After that time, "if the jury or court, as the case may be, finds that the defendant is incompetent, the charges shall be dismissed without prejudice." Former RCW 10.77.090(3) (1989) (relating to defendants charged with felonies).

Trial was set for July 2000. On July 18, the court conducted a hearing on a plea agreement. The State offered to amend the charges to one count of second degree domestic violence kidnapping with a deadly weapon enhancement (RCW 9A.40.030(l), 10.99.020, former 9.94A.125 (1983)) and one count of second degree domestic violence assault (RCW 9A.36.021(l)(c), 10.99.020). In exchange for the amended charges and a recommendation for a sentence in the high end of the standard range, Mr. Blakely agreed to an *Alford* plea of guilty.[2] Although Mr. Blakely complained that he could not think clearly due to the intolerable conditions in his jail cell, the trial court eventually determined that Mr. Blakely understood the charges and the agreement.

At the sentencing hearing two weeks later, Mr. Blakely attempted to withdraw the guilty plea, claiming he was pressured by his doctors and lawyers. Finding that it was not credible that Mr. Blakely was under duress or was misled, the trial court denied the motion to withdraw. The State then told the court the standard range for the kidnapping charge with the deadly weapon enhancement was 49 to 53 months and recommended the high end of that range to run concurrently with a sentence of 12 to 14 months for the assault. Before pronouncing sentence, the trial court asked for Mr. Blakely's comments and asked Ms. Blakely to describe her ordeal during the kidnapping. During her testimony, defense counsel protested that she was giving new information without being under oath. In response, the trial court told her to leave out extraneous details. Ultimately, the trial court rejected the State's recommendation for a standard range sentence and imposed an exceptional sentence of 90 months for the kidnapping, citing the aggravating factors of deliberate cruelty and commission of domestic violence in the presence of a minor child.

---

[2] See *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) (a defendant may plead guilty while disputing the facts alleged by the prosecution).

In August 2000, Mr. Blakely objected to the exceptional sentence and the trial court continued the matter for an evidentiary hearing. The court asked the State to subpoena Ms. Blakely and other witnesses and admitted it should have held a hearing with witnesses under oath and subject to cross-examination before imposing the exceptional sentence. Before the sentencing hearing, Mr. Blakely again moved to withdraw his guilty plea, arguing that the State violated the plea agreement by advocating for an exceptional sentence. The trial court found that the State's sentencing brief did not suggest what the court ought to do, and denied the motion.

At the sentencing hearing held in October 2000, Ms. Blakely, Ralphy, various mental health experts, and a police officer were examined and cross-examined. After hearing a statement from Mr. Blakely, the trial court again imposed an exceptional sentence of 90 months on the kidnapping charge, to run concurrently with a standard sentence of 14 months on the assault charge. Mr. Blakely's motion to vacate the sentence was denied in January 2001 and this appeal followed.

PRESUMPTION OF INCOMPETENCE

Mr. Blakely first challenges the jury instructions given in the competency trial. He contends the trial court erred in refusing to instruct the jury that a defendant is presumed incompetent to stand trial if there is proof of a mental illness adjudication.

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and properly inform the jury of the applicable law. *State v. Irons*, 101 Wn. App. 544, 549, 4 P.3d 174 (2000). Mr. Blakely argued at the competency trial that the civil court's conclusion that he lacked competence to represent himself in

the trust and dissolution proceedings raised a presumption of incompetence to stand trial on the criminal charges.

Although the trial court allowed admission of the civil court's findings, it held as a matter of law that the civil order did not constitute an adjudication of incompetence. On that basis, the trial court declined to instruct the jury that a mental illness adjudication rebutted the presumption of competence. The trial court properly found that neither the evidence nor the law supported Mr. Blakely's proposed instruction.

The test for competency to stand trial is whether the defendant is able to understand the proceedings against him or her and can assist in his or her defense. *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 862, 16 P.3d 610 (2001). A rebuttable presumption of mental incompetency is raised by proof of a mental illness adjudication. *State v. Smith*, 97 Wn.2d 801, 803, 650 P.2d 201 (1982); *State v. Bonner*, 53 Wn.2d 575, 587-88, 335 P.2d 462 (1959). On the other hand, "[i]t is the fact of mental incompetency, and not the adjudication of mental illness, that determines one's inability to form an intent to commit an offense, or his inability, after an offense has been committed, to aid in his defense." *Id.* at 586 (emphasis omitted).

The civil court deciding Mr. Blakely's trust and dissolution cases found that the weight of past and current psychological evaluations supported a finding that Mr. Blakely was not competent to understand the nature and complexity of the trust issues. Consequently, a guardian ad litem was appointed to represent his interests in those cases only. Mr. Blakely was not, however, adjudged to have a mental illness or to be generally incompetent. As the civil court stated in its order appointing the guardian ad litem, "The court's findings and conclusions in this case shall have no precedential or preclusive effect on any other civil or criminal proceeding involving Ralph H. Blakely, Jr. and the matters at issue

therein." Def.'s Ex. 1, at 2. Because the civil court's order did not presume to apply beyond the time frame and issues of the trust and dissolution proceedings, it did not constitute an actual adjudication of mental illness. The order served as relevant evidence of Mr. Blakely's ability to understand the criminal proceedings and to assist in his defense, but it did not give rise to a presumption that Mr. Blakely was incompetent. Consequently, the order did not support an instruction declaring that proof of a prior mental illness adjudication raised a presumption of incompetence. *Irons*, 101 Wn. App. at 549.

VIOLATION OF THE PLEA AGREEMENT

Mr. Blakely's next contention is that the prosecutor violated the plea agreement by advocating for an exceptional sentence upward. He argues that the prosecutor effectively undercut the recommendation of a standard sentence by discussing in the sentencing brief recent decisions on the factual bases for exceptional sentences and by eliciting testimony at the sentencing hearing to support aggravating factors.

A plea bargain is a contract between the criminal defendant and the prosecutor. *State v. Talley*, 134 Wn.2d 176, 182, 949 P.2d 358 (1998); *State v. Sledge*, 133 Wn.2d 828, 838-39 n.6, 947 P.2d 1199 (1997). Due process requires the prosecutor to adhere to the terms of the contract by recommending the agreed-upon sentence. *Talley*, 134 Wn.2d at 183; *Sledge*, 133 Wn.2d at 839. The prosecutor's conduct at the sentencing hearing must not undercut the plea bargain:

> Although the recommendation need not be made enthusiastically, the prosecutor is obliged to act in good faith, participate in the sentencing proceedings, answer the court's questions candidly in accordance with RPC 3.3 and, consistent with RCW 9.94A.460, not hold back relevant information regarding the plea agreement.[3]

Talley, 134 Wn.2d at 183. Mere participation in an evidentiary hearing convened by the court to determine whether evidence supports an exceptional sentence will not undercut the State's agreed-upon sentence recommendation. *Id.* at 185-86.

Mr. Blakely cites *In re Pers. Restraint of Palodichuk*, 22 Wn. App. 107, 589 P.2d 269 (1978) for the principle that less than wholehearted support for the terms of the plea bargain can constitute a breach. In *Palodichuk*, the prosecutor recommended a suspended sentence and probation, but then told the court he had obtained new information that gave him "second thoughts about that recommendation." *Id.* at 109 (emphasis omitted). The prosecutor's reservations did more than express less than wholehearted support for the terms of the plea bargain, they seriously undercut the agreement. *See Talley*, 134 Wn.2d at 184 (discussing *Palodichuk*).

Similarly, the prosecutor in *Sledge* recommended a standard range sentence for a juvenile offense, but then extensively examined the probation counselor concerning her reasons for recommending an exceptional sentence, presented the testimony of a parole officer who reported problems with the juvenile, and gave a detailed summary of the aggravating

---

[3] RPC 3.3 states:

"(a) A lawyer shall not knowingly:

"(1) Make a false statement of material fact or law to a tribunal."

"A prosecutor, like any other attorney, has a duty of candor toward the tribunal which precludes it from making a false statement of material fact or law to such tribunal." [*State v.*] *Coppin*, 57 Wn. App. [866,] 874 n.4[, 791 P.2d 228 (1990)].

RCW 9.94A.460 states in part:

"The prosecutor shall not agree to withhold relevant information from the court concerning the plea agreement."

factors to the court. The Supreme Court found that the prosecutor's fervor in setting out and emphasizing evidence supporting the aggravating factors undercut the plea bargain. *Sledge*, 133 Wn.2d at 842-43.

As the Supreme Court stated in *Talley*, 134 Wn.2d at 183, the prosecutor need not make the agreed sentencing recommendation enthusiastically, but must not appear to advocate for an exceptional sentence. The State's mere participation in an evidentiary hearing-presenting relevant evidence to the court and responding to its inquiries-will not constitute a breach of the plea bargain, while advocacy for an exceptional sentence by placing emphasis on aggravating factors will. *See Talley*, 134 Wn.2d at 186; *Sledge*, 133 Wn.2d at 843.

Here, the prosecutor consistently told the court he recommended the high end of the standard range. At the July 2000 sentencing hearing, the court found two aggravating factors-deliberate cruelty and domestic violence in the presence of the minor child-and imposed an exceptional sentence. When the trial court later decided it needed to conduct an evidentiary hearing to consider the evidence supporting an exceptional sentence, the prosecutor responded that "[w]e of course are not proponents of an exceptional sentence in these proceedings," but asked if he should subpoena witnesses. Report of Proceedings (RP) at 563. The court asked him to subpoena Ms. Blakely and any witnesses who observed Ralphy during the kidnapping incident. However, the court added, the evidentiary hearing was probably an "exercise in futility," because there was no dispute that Mr. Blakely put his wife in an apple wood box and kept her there in the presence of Ralphy. RP at 564. Apparently the trial court intended to impose an exceptional sentence based on the record, regardless of the State's recommendation.

Most of the evidence challenged by Mr. Blakely was presented by the State in response to assertions by the defense. For instance, before the evidentiary hearing, the State filed a response brief to Mr. Blakely's motion for a standard range sentence. Mr. Blakely had argued that *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) prohibited the trial court from imposing an exceptional sentence based on facts that had not been established by a jury beyond a reasonable doubt. The State's response brief examined the precedential effect of *Apprendi* and concluded that "[t]he court is not required to provide the defendant with a jury trial on the issue of whether an exceptional sentence will be imposed." CP at 578. Defense counsel moved to withdraw the guilty plea on the basis that the State's response brief violated the plea agreement by advocating for an exceptional sentence. In response, the prosecutor stated, "I hope that I have never at any point done anything that the court has interpreted as advocating an exceptional sentence in this case, because I did have an agreement with counsel which prohibited me from doing that.' RP at 585. In denying the motion to withdraw the guilty plea, the court found that the State's response brief did not advocate a particular sentence and did not give "even the narrowest suggestion of what the court ought to do." RP at 586.

As would be expected, the prosecutor's involvement in the evidentiary hearing was problematical. He was required to conduct examinations and cross-examinations of the witnesses in a manner that would present an accurate record to the court, while at the same time refraining from advocacy for the exceptional sentence he knew the court intended to impose. *See Talley*, 134 Wn.2d at 183. During the examination of Ms. Blakely, the prosecutor asked if she was afraid of Mr. Blakely during the kidnapping. She answered yes. It was the court, not the prosecutor, who asked a psychologist defense witness if Mr. Blakely could deliberately act in a cruel way. The witness answered that he could not make an opinion. Later, when the State presented the testimony of two mental

health witnesses, the prosecutor anticipated the court's question and asked each of them if Mr. Blakely had the capacity to be cruel. Both answered that he did.

Following this testimony, the court asked the prosecutor if he wished to be heard regarding the sentence recommendation. He responded, "Judge, [I] don't want to be heard right now. My understanding was that we had an agreed recommendation for a high end sentence, and that's what I continue to recommend to the court. Unless counsel wants to deviate from that recommendation, I don't have anything to say." RP at 1038.

Compared to the "second thoughts" expressed in *Palodichuk*, 22 Wn. App. at 109, and the detailed summary of aggravating factors given by the prosecutor in *Sledge*, 133 Wn.2d at 843, the prosecutor's conduct here does not rise to advocacy for an exceptional sentence. Unlike in *Sledge*, where the State insisted upon the evidentiary hearing with witnesses, here defense counsel moved for the hearing. As an officer of the court, the prosecutor was obliged to participate in the hearing, to call witnesses that would be helpful to the court, and to anticipate the questions the court wished to ask. *See Sledge*, 133 Wn.2d at 840. The State walks a thin line between, on the one hand, maintaining its duty to present relevant evidence and respond to the sentencing court's inquiries, and on the other hand, meeting its equally important obligation to uphold the plea agreement. *Talley*, 134 Wn.2d at 187. The important point is that the State must not in the process contradict its recommendation for a standard range sentence. *Sledge*, 133 Wn.2d at 840.

On balance, considering the sentencing court's conclusion from the start that undisputed facts in the record supported an exceptional sentence based on domestic violence and deliberate cruelty, the prosecutor's conduct in the evidentiary hearing did not undercut his insistence that he

recommended a standard range sentence. Addressing this issue, the trial court noted that it tried to pay attention to the prosecutor's conduct in regard to the difficult position in which the State was put by having recommended to the court a sentence within the standard range, having the court indicate that an exceptional sentence may be appropriate, having the court indicate those subjects that would need to be presented at a sentencing hearing, and then having the laboring oar in presenting the testimonial matters to the court. RP at 1056. The sentencing court concluded that the prosecutor confined himself to the matters that concerned the court and did not advocate for an exceptional sentence. The record supports that conclusion. Consequently, the State did not breach the plea agreement.

EXCEPTIONAL SENTENCE

Mr. Blakely next challenges his exceptional sentence. The trial court found two aggravating factors: (1) Mr. Blakely's conduct during the kidnapping manifested deliberate cruelty to his wife, former RCW 9.94A.390(2)(a) (1997); and (2) the offense involved domestic violence plus deliberate cruelty and commission within sight or sound of the victim's minor child, former RCW 9.94A.390(2)(h)(ii), (iii) (1997). Mr. Blakely contends the aggravating factors violate the real facts doctrine, former RCW 9.94A.370(2) (1996). He also contends the sentencing court violated the holding in *Apprendi*, 530 U.S. at 490, that requires a jury determination of the facts used to support an exceptional sentence outside the maximum range. Finally, he asserts the sentencing hearings violated due process by preventing defense counsel from cross-examining Ms. Blakely and by denying him the right to allocution.

I. The Real Facts Doctrine.

Under the Sentencing Reform Act of 1981, a trial court must impose a sentence within the standard range for the

offense unless the court finds substantial and compelling reasons justifying an exceptional sentence. Former RCW 9.94A.120(1), (2) (1998); *State v. Ferguson*, 142 Wn.2d 631, 64344, 15 P.3d 1271 (2001). Several nonexclusive mitigating and aggravating factors are provided in former RCW 9.94A.390 (1997), including the mitigating circumstance of diminished capacity (former RCW 9.94A.390(1)(e) (1997)) and the aggravating circumstances mentioned above. In reviewing an exceptional sentence, this court asks three questions: (1) Are the reasons given by the sentencing court supported by the record, using the clearly erroneous standard of review? (2) Do the reasons justify departure from the standard range as a matter of law? (3) Is the sentence clearly too excessive or too lenient, using the abuse of discretion standard of review? *Ferguson*, 142 Wn.2d at 646.

Mr. Blakely contends the trial court erred as a matter of law in considering facts that established a more serious crime than that to which he pleaded guilty. The so-called real facts doctrine of former RCW 9.94A.370(2) (1996) provides that the sentencing court generally may not use facts that establish a more serious crime or additional crimes as the basis for a sentence outside the presumptive range. In exchange for dismissing the charge of first degree kidnapping, the State agreed to allow Mr. Blakely to plead guilty to second degree kidnapping. As charged in the original information, the first degree kidnapping count alleged intentional abduction of a person with the intent to inflict extreme mental distress. RCW 9A.40.020(1)(d). Second degree kidnapping does not include the same intent element. RCW 9A.40.030. Mr. Blakely contends the finding of deliberate cruelty constitutes the same element as intent to inflict extreme mental distress, in effect allowing the court to sentence him for the more serious crime.

Deliberate cruelty has been defined as "gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain as an end in itself." *State v.*

Scott, 72 Wn. App. 207, 214, 866 P.2d 1258 (1993), *aff'd sub nom. State v. Ritchee*, 126 Wn.2d 388, 894 P.2d 1308 (1995), quoted in *State v. Copeland*, 130 Wn.2d 244, 296, 922 P.2d 1304 (1996). In *Ferguson*, 142 Wn.2d at 648-49, the Supreme Court held that deliberate cruelty could not be used to elevate a sentence for second degree assault because an element of the charge is the intent to do bodily harm. The court found that the defendant's charged offense, intent to inflict harm by exposing another to the human immunodeficiency virus (HIV), implicitly contains elements that constitute deliberate cruelty. *Id.* at 651.

Citing *Ferguson*, Mr. Blakely contends deliberate cruelty is implicitly the same as the infliction of extreme mental distress element of first degree kidnapping, and therefore violates the real facts doctrine. But gratuitous violence with the intent to inflict emotional pain (deliberate cruelty, *Scott*, 72 Wn. App. at 214) is not the same as the intent to inflict extreme mental distress. Even under the precedent of *Ferguson*, therefore, the real facts doctrine likely does not preclude deliberate cruelty as an aggravating factor in an exceptional sentence for second degree kidnapping. However, recognizing that *Ferguson* may direct a different conclusion, we decline to affirm the exceptional sentence on the basis of deliberate cruelty under former RCW 9.94A.390(2)(a) (1997). Instead, we find that the domestic violence aggravating factors alone support the exceptional sentence.

We begin by noting that the real facts doctrine does not apply to the domestic violence aggravating factors of former RCW 9.94A.390(2)(h) (1997). Former RCW 9.94A.370(2) (1996). The real facts statute specifically allows the court to consider acts of domestic violence that involve deliberate cruelty or intimidation of the victim as well as acts of domestic violence committed in the presence of the victim's or offender's minor child. Former RCW 9.94A.370(2) (1996); former RCW 9.94A.390(2)(h)(ii), (iii) (1997). Because the

trial court found that these aggravating circumstances also supported a departure from the standard range, the exceptional sentence is justified as a matter of law.[4] *State v. Cardenas*, 129 Wn.2d 1, 12, 914 P.2d 57 (1996) (an appellate court may uphold an exceptional sentence if satisfied that the trial court would have imposed the same sentence without the prohibited aggravating factor).

Mr. Blakely additionally contends that the sentence of 90 months is excessive in light of the standard range sentence of 13 to 17 months for second degree kidnapping. Former RCW 9.94A.310 (1998); former RCW 9.94A.320 (1998). He fails to take into consideration the firearm enhancement of 36 months, which makes the high end of the standard range for this crime 53 months. Former RCW 9.94A.310(3)(b) (1998). We will not disturb the trial court's discretion unless we find that no reasonable judge would have imposed the same sentence. *Cardenas*, 129 Wn.2d at 13. Here, the trial court stated that "[t]here is a part of the court's thinking that suggests that 90 months as an exceptional sentence is an insufficient judicial response to this conduct." RP at 1053. Given the circumstances of the crime, we cannot say that no reasonable judge would have made the same decision. *Cardenas*, 129 Wn.2d at 13.

---

[4] At oral argument, the State admitted that the trial court was not sure if the aggravating factor of domestic violence in the presence of the minor child, standing alone, would support an exceptional sentence. The record indicates, however, that the trial court considered deliberate cruelty and domestic violence with deliberate cruelty sufficient to support the sentence. Whether or not deliberate cruelty under former RCW 9.94A.390(2)(a) (1997) could be used to elevate the sentence for second degree kidnapping, the alternate basis of domestic violence with deliberate cruelty supports the exceptional sentence here. *State v. Cardenas*, 129 Wn.2d 1, 12, 914 P.2d 57 (1996).

II. Application of *Apprendi*.

Mr. Blakely contends the United States Supreme Court decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) provides that the factual basis for an exceptional sentence upward must be submitted to a jury and proved beyond a reasonable doubt. However, recently the Washington Supreme Court in *State v. Gore*, 143 Wn.2d 288, 314, 21 P.3d 262 (2001) held that *Apprendi* does not apply to factual determinations that support reasons for exceptional sentences upward. *Gore* held that Washington's statutory scheme permits a judge to impose an exceptional sentence within the maximum range determined by the Legislature. *Id.* at 313-14. Because the statutory and nonstatutory aggravating factors neither increase the maximum sentence nor define separate offenses calling for separate penalties, the *Apprendi* rule is not triggered. *Id.* at 314. Consequently, the facts supporting the exceptional sentence here did not have to be submitted to a jury or proved beyond a reasonable doubt. *Id.* at 315; *see also State v. Hopkins*, 109 Wn. App. 558, 569, 36 P.3d 1080 (2001).

III. Due Process and the Sentencing Hearing.

During the first sentencing hearing, defense counsel did not cross-examine Ms. Blakely during her victim's statement. He now contends he was entitled by due process to confront the witnesses at the sentencing hearing and further contends he was not granted a formal opportunity for allocution.

The Sixth Amendment confrontation clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Generally, due process is satisfied in the context of a sentencing hearing as long as the defendant has an opportunity to rebut the evidence presented. *State v. Strauss*, 119 Wn.2d 401, 418-19, 832 P.2d 78 (1992). While the effect of the

confrontation clause on sentencing hearings has not yet been established in Washington, *id.* at 414-15, we need not reach this issue here because Mr. Blakely was given the opportunity to cross-examine Ms. Blakely and all the other witnesses at the evidentiary hearing. Ms. Blakely's testimony in the first sentencing hearing constituted a victim impact statement rather than evidence to support an aggravating factor. *See* former RCW 9.94A.110 (1998). When she testified as a witness at the subsequent evidentiary hearing, however, defense counsel cross-examined her as extensively as he did all the other witnesses.

As for Mr. Blakely's right of allocution, he seems to argue that he was denied the opportunity to give a formal statement before sentence was pronounced. A defendant's right of allocution is derived from state statutes and is not constitutional in nature. *In re Pers. Restraint of Echeverria*, 141 Wn.2d 323, 335, 6 P.3d 573 (2000). As with the victim impact statement, the offender is provided an opportunity to address the sentencing court before sentence is imposed. Former RCW 9.94A.110 (1998); *Echeverria*, 141 Wn.2d at 335. The statute does not require that the offender's statement be made immediately before imposition of the sentence and does not require a formal request from the court. *Id.* at 336.

In this case, the trial court asked Mr. Blakely at the first sentencing hearing and at the evidentiary hearing if there was anything he wanted to say. On both occasions Mr. Blakely took the opportunity to explain to the court his version of the events and the motivations of the witnesses against him. Although the trial court did not specifically ask Mr. Blakely if he had anything to say in mitigation of the sentence-the better course to scrupulously comply with former RCW 9.94A.110 (1998), according to *Echeverria*, 141 Wn.2d at 336-37-clearly Mr. Blakely understood that he was asked whether he had information that supported a lower sentence.

PRO SE ISSUES

Mr. Blakely raises additional issues pro se, including contentions that the State withheld evidence, that the weapon enhancement was added as retaliation for Mr. Blakely's complaints against jail conditions, and that his counsel was ineffective.

According to the pro se brief, the State failed to produce the registration on the truck used in the kidnapping and withheld evidence that proved Ms. Blakely used poison to control his actions during the kidnapping. Mr. Blakely also alleges that the prosecutor withheld a copy of a 1995 social security disability form that shows his wife attempted to cheat the government by forging Mr. Blakely's name to a false claim. Besides the fact that Mr. Blakely fails to show how the alleged withholding of this evidence affected his guilty plea, he also fails to show any reference in the record to the purported evidence. Matters mentioned in the brief but not included in the record cannot be considered on appeal. *State v. Stockton*, 97 Wn.2d 528, 530, 647 P.2d 21 (1982), cited in *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Similarly, the record shows no evidence to support an inference that the State added the deadly weapon enhancement in retaliation for Mr. Blakely's threat to sue Grant County for intolerable jail conditions. In April 2000, Mr. Blakely filed "A Claim for Discrimination and Negligence and Punishment" that alleged he had been forced to live in isolation with bacterial and viral infections, had been denied an operation that would have fixed his "brain functions," and had been mistreated by inmates and staff at the jail. CP at 399-400. He requested a settlement of $5 million on the claim. Beyond the accusations in the claim, nothing in the record supports the validity of these assertions. The amended information adding the deadly weapon enhancement to the two first degree kidnapping charges was filed in July 2000. Although the amendment was

made after Mr. Blakely's discrimination claim, nothing in the record supports an inference that it was made in retaliation for Mr. Blakely's threat to sue.

Insufficient record also defeats Mr. Blakely's contention that he received ineffective assistance of counsel. To prove ineffective counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness and that counsel's representation prejudiced the defendant. *McFarland*, 127 Wn.2d at 334-35. Attorney competency is determined based only on the record below. *Id.* at 335. We engage a strong presumption that counsel was effective. *Id.* Mr. Blakely contends his counsel was deficient in failing to attend his court-ordered mental health evaluations, in pressuring him to enter into the guilty plea without explaining the possible sentence, and in failing to gather the necessary evidence to impeach his wife's testimony.

Defendants in noncapital cases generally do not have a right to have counsel present during psychological examinations. *State v. Decker*, 68 Wn. App. 246, 251, 842 P.2d 500 (1992). Counsel may attend, but strictly as an observer, not as an active participant. *State v. Nuss*, 52 Wn. App. 735, 741, 763 P.2d 1249 (1988). When a defense of diminished capacity is raised, the defendant waives his privilege against self-incrimination. *Id.* at 742. Nothing in the record indicates that Mr. Blakely ever requested the presence of counsel at his mental health evaluations or that the presence of counsel would have been of any benefit to his case.

The record also fails to show that defense counsel pressured Mr. Blakely to accept the terms of the plea agreement. A guilty plea must be entered knowingly, voluntarily, and intelligently. *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). The defendant must understand the plea's direct sentencing consequences. *Id.* A claim that the defendant was coerced to plead guilty must be supported with

more than self-serving allegations. *State v. Osborne*, 102 Wn.2d 87, 97, 684 P.2d 683 (1984).

During the hearing on the plea agreement held in July 2000, the court asked Mr. Blakely if he understood the terms of the agreement, the sentence range, and the fact that the trial court was not bound by the terms of the agreement to impose the sentence recommended by the State. Mr. Blakely first asked to die and claimed his mind was not clear due to lack of sleep, but eventually agreed that he understood. He went over the plea agreement with the court and with trial counsel before signing. Only later did he claim his doctors and lawyers pressured him into signing the agreement. Nothing in the record beyond his bare assertion of fact supports his allegations that the plea was involuntary.

Finally, the record does not support Mr. Blakely's assertion that defense counsel failed to investigate evidence that Ms. Blakely orchestrated the kidnapping by poisoning her husband and controlling his mind. As with the other claims of ineffective assistance of counsel, our review on direct appeal is limited to matters within the trial record. *McFarland*, 127 Wn.2d at 335. With support for Mr. Blakely's claims nonexistent in this record, we are compelled to find that defense counsel's representation was effective.

Affirmed.

/s/
Schultheis, J.

WE CONCUR:

/s/
Sweeney, J.

/s/
Kurtz, J.

SUPERIOR COURT OF WASHINGTON
FOR GRANT COUNTY

STATE OF WASHINGTON,)
) No. 98-1-00610-5
Plaintiff,
) JUDGMENT AND
vs.) SENTENCE (JS)
)
HOWARD RALPH BLAKELY,) [√] Prison
)
Defendant.) [ ] Clerk's action
SID# WA15275162; DOB 6-3-36) required, firearms
AGENCY: GCSO 98-GS12773) rights revoked 5.6

I. HEARING

1.1 A sentencing hearing was held present were:
Defendant: HOWARD RALPH BLAKELY
Defendant's Lawyer: Doug Phelps
(Deputy) Prosecuting Attorney: John Knodell

II. FINDINGS

There being no reason why judgment should not be pronounced, the Court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on July 17, 2000 by Plea

COUNT	CRIME with RCW	CRIME DATE
1	KIDNAPPING IN THE SECOND DEGREE, DOMESTIC VIOLENCE, RCW 9A.40.030(1), 10.99.020 & RCW 9.94A.125 (CRIME CODE 00655)	October 26, 1998
2	ASSAULT IN THE SECOND DEGREE, DOMESTIC VIOLENCE, RCW 9A.36.021(1)(c) & 10.99.020 (CRIME CODE 01035)	October 26, 1998

as charged in the Information

[X] A special verdict finding for use of **firearm** was returned on Count(s) 1 RCW 9.94A.125.310.

[ ] A special verdict/finding for use of **deadly weapon other than a firearm** was returned on Count(s) _ RCW 9.94A.125, .310

[ ] A special verdict/finding of **sexual motivation** was returned on Count(s) _ RCW 9.94A.127

[ ] A special verdict/finding for **Violation of the Uniform Controlled Substances Act** was returned on Count(s) __

RCW 69.50.401 and RCW 69.50.435, taking place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.

[ ] A special verdict/finding that the defendant committed a crime involving the manufacture of methamphetamine **when a juvenile was present in or upon the premises of manufacture** was returned on Count(s). RCW 9.94A,-RC W 69.500.401(a), RCW 69.50.440.

[ ] The defendant was convicted of **vehicular homicide** which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030.

[ ] This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as

defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.

[ ] The court finds that the offender has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.

[X] The crime charged in Counts 1 & 2 involves **domestic violence**.

[ ] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.400):

CURRENT OFFENSES ENCOMPASSING
N/A

[ ] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

OTHER CURRENT OFFENSES USED IN CALCULATING OFFENDER SCORE
N/A

2.2 CRIMINAL HISTORY (RCW 9.94A.360):

CRIME		DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J	TYPE OF CRIME
1	Grand Larceny Washes	Unk	Bozeman, MT	12-6-54	A	NV
2	Petty Larceny	Unk	Aurora, CO	11-8/63	A	Unk
3	Assault/ Contempt of Court	Unk	Littleton, CO	8/17/66	A	Unk
4	Larceny	Unk	Big Horn County, WY	5-5-69	A	NV
5	Kidnapping	Unk	Powell, WY	5-14-69	A	V

	Washes					
6	False income tax return, conspiracy subscribe false income tax returns	Unk	Spokane, WA	6-3-87	A	Unk

[ ] The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.360.

[ ] The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.360):

PRIOR CONVICTIONS ENCOMPASSING
N/A

[ ] The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

PRIOR CONVICTIONS COUNTED AS ENHANCEMENTS

2.3 SENTENCING DATA:

Count No.	Offender Score	Seriousness Level	Standard Range (not including enhance-ments)	Plus Enhance-ment*	Total Standard Range (including enhance-ments)	Maximum Term
1	2	V	13-17 mos.	F	49-53 mos.	10 years
2	2	IV	12-14 mos.	N/A	12+-14 mos.	10 years

*(F) Firearm, (D) Other deadly weapons, (V) VUCSA in protected zone, (VH) Veh. Hom., See RCW 46.61.520, (JP) Juvenile Present

2.4 [ ] EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence

[ ] above [ ] within [ ] below the standard range for Count(s) ____. **Findings of fact and conclusions of law are attached in Appendix 2.4**. The Prosecuting Attorney [ ] did [ ] did not recommend a similar sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.142

[ ] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.142):

_____

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are [ ] attached [X] as follows: Prosecutor recommends the high end of the sentencing range.

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1

3.2 [ ] The Court DISMISSES Counts N/A

[ ] The defendant is found NOT GUILTY of Counts N/A

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court:

$to be determined at a later date. Restitution to:

JASS CODE $ Restitution to:

RTN/RUN $ Restitution to:

(Name and Address—address may be withheld and provided confidentially to Clerk's Office)

PCV	$500.00	Victim assessment		RCW 7.68.035
CRC	$2,014.68	Court costs, including Criminal filing fee	$110.00 FRC	RCW 9.94A.03 9.94A.120, 10.01.160, 10.46.190
		Witness costs	$1241.08 WFR	
		Sheriff service fees	$413.60 SFR/SFS/SFW/WRF	
		Jury demand fee	$250.00 JFR	
		Other	$	
PUB	$_____	Fees for court appointed attorney		RCW 9.94A.030
WFR	$_____	Court appointed defense expert and other defense costs		RCW 9.94A.030
FCM/MTH	$_____	Fine RCW 9A.20.021;		
	$_____	VUCSA additional fine [ ] deferred due to indigency		RCW 69.50.430
CDF/LDI/FCD NTF/SAD/SDI	$____	Drug enforcement fund of _____		RCW 9.94A.030
CLF	~~$100.00~~	Crime lab fee [ ] deferred due to indigency		RCW 43.43.690
MTH	$_____	$3,000 Meth/Amphetamine Cleanup fine		RCW 69.50.440 or 69.50.401(a)(1)(ii)
EXT	$	Extradition costs		RCW 9.94A.120
	$	Emergency response costs (Vehicular Assault, Vehicular Homicide only, $1000 maximum)		RCW 38.52.430

$_____ Other costs for: _____

_____

$2,514.69 TOTAL RCW 9.94A.145

[ ] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.142. A restitution hearing:

[ ] shall be set by the prosecutor

[ ] is scheduled for _____

[ ] RESTITUTION. Schedule attached, Appendix 4.1.

[ ] Restitution ordered above shall be paid jointly and severally (if adjudicated) with:

NAME of other defendant CAUSE NO. (VICTIM NAME) (AMOUNT)

[ ] The Department of Corrections (DOC) may immediately issue a Notice of Payroll Deduction.

RCW 9.94A.200010

All payments shall be made in accordance with the policies of the clerk and on a schedule established by DOC, commencing immediately, unless the court specifically sets forth the rate here: Not less than $_____ per month commencing _____. RCW 9.94A.145

[ ] In addition to the other costs imposed herein the Court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the statutory rate. RCW 9.94A.145.

[ ] The defendant shall pay the costs of services to collect unpaid legal financial obligations. RCW 36.18.190.

[ ] The financial obligations imposed in this judgment shall bear interest from the date of the Judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.

4.2 [ ] HIV TESTING. The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

[X] DNA TESTING. The Defendant shall have a blood sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

4.3 The defendant HOWARD RALPH BLAKELY shall not have contact with Yolanda Blakely (dob 2-20-56) and Ralphy H. Blakely (dob 01-01-85) name, DOB, including, but not limited to, personal, verbal, telephonic, written or contact through a third party for _____ years (not to exceed the maximum statutory sentence)

4.4 **OTHER:** _____

[ ] The following firearm(s) shall be forfeited pursuant to RCW 9.41.098: _____

_____

_____

[ ] _____

_____

_____

_____

_____

_____

_____

_____

4.5 **CONFINEMENT OVER ONE YEAR.** The defendant is sentenced as follows:

(a) **CONFINEMENT.** RCW 9.94A.400. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

*90	months on Count	1		months on Count	
14	months on Count	2		months on Count	
	months on Count			months on Count	

* Exceptional sentence; Findings of Fact and Conclusions of Law are attached

Actual number of months of total confinement ordered is: __

(Add mandatory firearm and deadly weapon enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

_____

The sentence herein shall run consecutively with the sentence in cause number(s) _____

but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.400.

Confinement shall commence immediately unless otherwise set forth here: _____

_____

(b) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.120. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: _____

4.6 [√] **COMMUNITY PLACEMENT** is ordered as follows: Count 1 and 2 for 12 months; Count ___ for ___ months; Count ___ for ___ months.

[ ] **COMMUNITY CUSTODY** is ordered as follows:
Count ____ for a range from ____ to ____ months;
Count ____ for a range from ____ to ____ months;
Count ____ for a range from ____ to ____ months;
or for a period of earned early release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer and standard mandatory conditions are ordered. [See RCW 9.94A for community placement offenses-serious violent offense, second degree assault, any crime against a person with a deadly weapon finding. Chapter 69.50 or 69.52 RCW offense. Community custody follows a term for a sex offense-RCW 9.94A. Use paragraph 4.7 to impose community custody following work ethic camp.]

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community service; (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not

unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; (6) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

[ ] The defendant shall not consume any alcohol.

[√] Defendant shall have no contact with: Any member of victim's immediate family.

[ ] Defendant shall remain [ ] within [ ] outside of a specified geographical boundary, to wit: _____

_____.

[ ] The defendant shall participate in the following crime related treatment or counseling services: _____

_____

[√] The defendant shall undergo an evaluation for treatment for [ ] domestic violence [ ] substance abuse [√] mental health [ ] anger management and fully comply with all recommended treatment.

[ ] The defendant shall comply with the following crime-related prohibitions: _____

_____

Other conditions may be imposed by the court or DOC during community custody, or are set forth here: defendant shall pay all court-ordered legal financial obligations: _____

_____

_____

_____

4.7 [ ] **WORK ETHIC CAMP**. RCW 9.94a.137, RCW 72.09.410. The court finds that defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: _____

_____

V. NOTICES AND SIGNATURES

5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this judgment and sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period of up to 10 years from

the date of the sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed all on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.145 and RCW 9.94A.120(13).

5.3 **NOTICE OF INCOME-WITHHOLDING ACTION**. If the court has not ordered an immediate notice of payroll deduction in paragraph 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.200010. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.200030.

5.4 **RESTITUTION HEARING.**

[ ] Defendant waives any right to be present at any restitution hearing (sign initials): _____.

5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.200.

5.6 **FIREARMS. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record.** (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification, to the Department of Licensing along with the date of conviction or commitment). RCW 9.41.040, 9.41.047.

Cross off if not applicable:

~~5.7 **SEX AND KIDNAPPING OFFENDER REGISTRATION.** RCW 9A.44.130, 10.01.200. Because this crime involves a sex or kidnapping offense (e.g. kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW where the victim is a minor and you are not the minor's parent), you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.~~

~~If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within 30 days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry out a vocation in Washington, or attend school in Washington, you must register within 30 days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.~~

~~If you change your residence within a county, you must send written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send written notice of your change of residence to the sheriff of your new county of~~

~~residence at least 14 days before moving, register with that sheriff within 24 hours of moving and you must give written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of Washington state, you must also send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington state.~~

~~If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier.~~

~~Even if you lack a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody or within 14 days after ceasing to have a fixed residence. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report in person to the sheriff of the county where you are registered on a weekly basis if you have been classified as a risk level II or III, or on a monthly basis if you have been classified as a risk level I. The lack of a fixed residence is a factor that may be considered in determining a sex offender's risk level.~~

~~If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.~~

5.8 **OTHER**: _____

_____

DONE in Open Court and in the presence of the defendant this date: 11/13, 2000.

/s/
EVAN E. SPERLINE, JUDGE

/s/	/s/	/s/
John Knodell	Doug Phelps	HOWARD RALPH BLAKELY,
WSBA #11284	WSBA #22920	Defendant
(Deputy)	Attorney for	
Prosecuting Attorney	Defendant	

Translator signature/Print name: _____

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF GRANT

STATE OF WASHINGTON, Plaintiff, vs. HOWARD RALPH BLAKELY, Defendant.	No. 98-1-00610-5 FINDINGS OF FACT & CONCLUSIONS OF LAW RE: EXCEPTIONAL SENTENCE

An exceptional sentence above the standard range should be imposed herein based upon the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The defendant and Yolanda Blakely married in 1973. They raised three children, Becky, Lorene and Ralph III (Ralphy). In May 1995, Yolanda left the family home with Lorene and Ralphy, eventually settling in Spokane. There she filed a divorce action in August, 1995.

2. During the marriage, the Blakelys created a trust, known as the Blakely Fay Trust, as a tax shelter. In 1996, Yolanda commenced a lawsuit to unravel the trust. There was also other litigation, and a great deal of animosity, between the Blakelys after their separation. Mrs. Blakely obtained a restraining order in the divorce case to prohibit the defendant from approaching her or her home.

3. The Blakelys acquired a considerable number of real properties, including a home, ranch and development property in Three Forks, Montana, an orchard and home in Grant County, a lake home, and several rental properties. In December, 1997, Mrs. Blakely obtained from the Spokane

divorce court authority to occupy the home and orchard. She moved to that property and undertook management of the orchard in January, 1998. In June, 1998, Ralphy joined her, having remained in Spokane to finish the seventh grade. Yolanda obtained a modification of the subsisting restraining order to prohibit the defendant from approaching the orchard property.

4. In October, 1998, Ralphy was attending 8th grade in Royal City and helping with the orchard. Harvest was completed around mid-October. Ralphy regularly left on a bus for school around 6:00 a.m., and returned on a bus about 6:00 to 6:30 p.m., after football practice.

5. The Blakely home was located in roughly the middle of the east side of the orchard. Just after 3:00 p.m. on October 26, Yolanda walked from the area of the house to the southeast corner of the property, about 900 feet, along a road/driveway, to retrieve her mail. As she returned, the defendant emerged from the apple trees south of the house. He approached Yolanda, pointing out a spider on her mail. As she disposed of the spider, she saw that the defendant appeared very angry. He grabbed her wrists and arms, twisting them. A scuffle ensued.

6. The defendant got Yolanda down on the ground near the first row of trees. He pinned her to the ground by painfully driving his knee into her ribs, and pulled a roll of duct tape from a plastic sack in his rear pocket. He attempted to cover her mouth with duct tape, wrapping it several times around her head, face and chin. He taped her wrists together very tightly.

7. The defendant carried Yolanda to an area between the rows of apple trees. In a very angry voice, the defendant said during this time, "You had no business filing the divorce – I want it dismissed;" "I want the trust litigation

dismissed;" and "cooperate with me so you won't get hurt any more." The defendant walked Yolanda west through the orchard on a service road, saying, "We need to get ahold of Lorene to help get the trust litigation dismissed." He also mentioned "O.J." and a "Dr._____" getting away with what they did, suggesting he would too.

8. At the end of the service road, the defendant led Yolanda south to a place where he had hidden his pickup truck from view in some willow trees near the southwest corner of the orchard. He told her that he had many guns and ammunition, and several knives, with him. He told her that if she failed to cooperate, they were both going to die.

9. Mr. Blakely opened the lift gate of the pickup canopy, revealing in the bed of the pickup a coffin-like plywood box. He produced a knife, and ordered Yolanda to climb into the box. Yolanda climbed slowly over the pickup tailgate, and the defendant held the knife close to her face, demanding that she hurry. When she lay down in the box, the defendant closed and latched the lid. The interior of the box is approximately the same width as, and about three inches longer than, Yolanda's body. Air holes had been drilled in the lid and ends of the box.

10. The defendant then drove the pickup rapidly through the orchard to an area between tree rows near the back of the house. He then opened the box lid and held the knife to Yolanda's face, demanding to know where her car keys were. He then shut the box again. He brought Yolanda's Ford car to the same vicinity, and apparently began to load belongings from the house into the vehicles. On about four more occasions, the defendant opened the plywood box to extract information from Yolanda, such as when Ralphy would be home, where certain property items and documents could be found, and the address of the Blakely's oldest daughter, Becky. Throughout this process, the defendant appeared to grow

increasingly agitated and mean. He pressed the knife blade to Yolanda's throat or nostrils to compel her compliance, telling her he had just sharpened the knife, that he could cut her right now, and that she'd bleed to death.

11. As night fell, Yolanda complained of being cold and the defendant placed a blanket in the plywood box over her. After she heard the school bus stop out on the road, Yolanda attempted to holler and bang her feet on the box to warn her son of the danger. As Ralphy, then age 13, walked up the dark driveway, the defendant emerged from between the apple trees. He said, "Your mother's in great danger. Come with me and don't cause any trouble." Ralphy saw the knife, and the defendant said that he was desperate, and would use the knife if he needed to.

12. The defendant led Ralphy behind the orchard shop and house to a space between the 4th and 5th tree rows, where he saw the defendant's pickup and his mother's car. He heard yelling and kicking from inside the pickup, and heard his mother cry out, "Ralphy, are you okay?" and "Don't hurt him, Howard!" The defendant opened the lift gate and Ralphy saw the wooden box, but it remained closed. The defendant advised Ralphy that they were leaving, and he was going with them. He began to direct Ralphy to prepare to depart.

13. The defendant permitted his son to use the bathroom inside the house, and Ralphy used the opportunity to attempt to locate a pistol in his mother's closet, but was unable to find it. Before departing the orchard property, the defendant told Ralphy that he had a loaded shotgun in the pickup and if Ralphy "tried anything," all the defendant had to do was turn it around toward the wooden box and pull the trigger.

14. The defendant directed Ralphy, age 13, to drive his mother's car, and defendant drove his pickup with Yolanda inside the wooden box. After driving approximately five

miles, the two vehicles stopped at the Mar Don Resort store for gas, but it was closed. The defendant opened the pickup canopy lift gate and opened the lid of the wooden box "to give [Yolanda] some air." At that time, Ralphy first saw his mother, wrapped in a blanket, inside the box. He saw the duct tape wrapped around her face and head. The defendant repeated to Ralphy the warning that his mother's safety depended on his cooperation.

15. It was decided the party would drive to Ernie's Truck Stop on the outskirts of Moses Lake for gas (at Yolanda Blakely's suggestion. After driving another ten miles, defendant stopped again and opened the wooden box, just before entering Highway 17 about two miles south of Ernie's. Upon arriving at the truck stop, defendant drove his pickup far to the rear of the property, behind several parked trucks, and instructed Ralphy on the routine they would follow to fuel the vehicles and pay for the fuel. Defendant first pulled the pickup to the pumps and filled its tank; then Ralphy pulled the car to the pumps and fueled it. Defendant and Ralphy then entered the truck stop store.

16. As the defendant reached the cashier's counter, Ralphy suddenly moved to a second cashier and shouted, "Call 9-1-l! Help us! He kidnapped us! He has my mom in a box!" The defendant grabbed Ralphy by the arm and dragged him from the store. Ralphy tried to prevent his removal by clinging to the door jamb, but was dragged outside. There the scuffling continued, until some truck drivers hollered at the defendant to leave the boy alone. The defendant then released Ralphy and ran to the cab of the pickup.

17. Ralphy chased after the defendant and jumped on the rear bumper, attempting to open the box to free his mother. The defendant drove rapidly out of the truck stop lot, shaking Ralphy loose from the vehicle as it bumped over the gutter. Ralphy ran back into the store, where the clerk had

reached the 9-1-1 operator, and he provided a description of the defendant and his pickup to the operator.

18. The defendant drove south on Highway 17. Because the lift gate was up, Yolanda was nauseated by the diesel fumes entering the wooden box. After about half an hour, the defendant stopped the pickup. Just before the stop, the lid of the wooden box became unlatched and Yolanda was able to sit up briefly. She realized they were near a cattle feed lot in the area of Warden.

19. The defendant was angry and agitated, shouting "Ralphy ruined everything!" Yolanda told the defendant she felt sick and needed to urinate. He helped her out of the box (where she had remained for approximately four hours) and, because her hands were taped, assisted in pulling down her pants so she could empty her bladder. His tone was urgent, demanding and angry. He instructed her that she could now ride in the cab as long as her wrists remained bound, and roughly removed the tape (along with some hair) from her head and face. In the cab, the defendant again displayed the knife to Yolanda, then laid it in her view on the dashboard ledge. He instructed her that, if they were stopped, she must tell the police that she was accompanying defendant of her own free will.

20. The defendant had piled food, water, business files and other items next to the passenger door, so Yolanda had to sit next to him in the cab. They eventually drove from Warden to Lind, on Highway 26 to Colfax, Highway 195 to Pullman and Lewiston, Idaho, Highway 12 to Orofino, Idaho, Lolo, Montana and Missoula, Montana, and 1-90 to Three Forks, Montana.

21. At some point in Idaho, defendant removed the tape from Yolanda's wrists. The two discussed issues relating to their divorce. They shared a banana.

22. East of Orofino, one of the pickup's tires blew. The defendant responded angrily to the frustration and delay of changing the tire. He ordered Yolanda back into the wooden box, where she stayed for approximately 45 minutes while defendant changed the tire. Later, as they neared Lolo, the defendant stopped and ordered Yolanda back into the wooden box so that he could stop for gas. He drove a short distance to a gas station, filled the tank, and drove on for a while before stopping to let Yolanda out of the box. She spent about half an hour in the box on this occasion.

23. Exiting 1-90 at Three Forks, the defendant stopped at a farm and ordered Yolanda back into the wooden box. He then drove a short distance, used a pay phone, then drove rapidly along a road Yolanda recognized from its extreme dustiness and bumps, and from cattle guards over which the pickup traveled. The Blakely's Montana home is on this road nearby. Defendant finally stopped the pickup and, after a delay, opened the lift gate and wooden box. Yolanda emerged cramped, bruised, gasping for air, her legs "asleep." They were at the home of Mary Gillespie, whom Yolanda had not before met.

24. Yolanda was allowed to clean up in Ms. Gillespie's bathroom. When the defendant returned briefly to the pickup, Ms. Gillespie and Yolanda formulated a plan to contact the police. While at the home, the defendant telephoned his friend Ilse Barros, telling her that he had kidnapped Yolanda and Ralphy, that Ralphy had gotten away, and that the defendant was in trouble. He called daughter Lorene, telling her to go to Moses Lake to find Ralphy and to call "the lawyers" to stop both the divorce and trust litigation. He told Lorene Yolanda was sleeping, but when Lorene heard Yolanda speaking in the background, the defendant allowed Yolanda to talk to Lorene, instructing her what to say. The defendant also called a stock broker in Billings, received some price quotations and gave the broker certain sell orders. The

defendant discussed with Yolanda the trust litigation and sale of the Grant County orchard, which he insisted be done immediately. He instructed Mary Gillespie to retrieve from his father (who was staying nearby) a copy of the legal description of the Blakelys' Logan, Montana property-which had been titled in Yolanda's name-so that he could prepare a deed for Yolanda to sign. He sat at the kitchen table and began to do some typing when he looked outside and saw that the house was surrounded by police officers.

25. The defendant instructed Yolanda to go outside and tell the police she had come voluntarily. Yolanda walked out and told the police of the kidnapping. Ultimately, the defendant was taken into custody without incident.

26. At various times since 1972, the defendant has been assessed by mental health professionals. He has been diagnosed as suffering from schizophrenia, paranoid type, on several occasions. He has been diagnosed by others as being free of any such psychosis, but having a pervasive personality disorder. The most thorough evaluation of the defendant's mental status was accomplished at Eastern State Hospital during the pretrial course of this case.

27. Defendant has an (Axis II) Paranoid personality disorder with schizotypal traits and a Narcissistic personality disorder with antisocial traits. Because of the first disorder, the defendant tends to experience life through a pervasive distrust and suspiciousness of others, a conviction that others are exploiting, harming or deceiving him, a doubt of the loyalty or trustworthiness of friends and associates, a reluctance to confide in others due to a fear that the disclosures will be maliciously used against him. He reads hidden or threatening meaning into innocuous or neutral events, perceives attacks on his character that are not apparent, and bears persistent grudges. These traits are not limited to times when the

defendant is experiencing a mood disorder, that is, they constitute lifelong patterns not caused by a medical problem.

28. Because of the narcissistic personality disorder, the defendant tends to have a grandiose sense of his own importance and to exaggerate his own achievements and talents. He expects to be recognized as superior without commensurate achievements, and is pre-occupied with ideas of importance and ideal love. He feels "entitlement" and that he is "special." The defendant lacks empathy, is envious and believes others are envious of him, and tends toward arrogant, haughty behavior.

29. The defendant's personality disorders influence and direct, but do not cause, his behavior. Defendant is able to sufficiently perceive the impacts of his conduct on others to behave with deliberate cruelty.

30. The kidnapping of Yolanda Blakely by the defendant was a domestic violence offense.

31. The defendant's motivation to commit kidnapping was complex, contributed to by his mental condition and personality disorders, the pressures of the divorce litigation, the impending trust litigation trial and anger over his troubled interpersonal relationships with his spouse and children. While he misguidedly intended to forcefully reunite his family, his attempt to do so was subservient to his desire to terminate lawsuits and modify title ownerships to his benefit.

32. The defendant's methods were more homogeneous than his motive. He used stealth and surprise, and took advantage of the victim's isolation. He immediately employed physical violence, restrained the victim with tape, and threatened her with injury and death to herself and others. He immediately coerced the victim into providing information

by the threatening application of a knife. He violated a subsisting restraining order.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the court makes the following Conclusions of Law:

1. As described in RCW 9.94A.390(l)(e), the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired by his personality disorders, but not significantly so. Defendant's personality disorders did not significantly impair his capacity to act with deliberate cruelty.

2. Repeatedly and protractedly confining his victim in a coffin-like box manifested deliberate cruelty to the victim, as described in RCW 9.94A.390(2)(a).

3. As described in RCW 9.94A.390(2)(h), the current offense involved domestic violence, as defined in RCW 10.99.020, and occurred within sight and sound of the victim and defendant's minor child. The defendant's conduct manifested deliberate cruelty to, and intimidation of, the victim.

4. Considering the purposes of chapter 9.94A RCW, and in light of a standard range for kidnapping in the second degree of 13 to 17 months (enhanced to 49 to 53 months by firearm enhancement), the foregoing findings of fact and conclusions of law constitute substantial and compelling reasons justifying an exceptional, aggravated sentence.

5. A sentence of 90 months incarceration is a just and deserved punishment for defendant's conduct.

DONE IN OPEN COURT this 13 day of Nov., 2000.

/s/ Evan E. Sperline
JUDGE

SUPERIOR COURT OF WASHINGTON
FOR GRANT COUNTY

STATE OF WASHINGTON, Plaintiff, v. HOWARD RALPH BLAKELY, Defendant.	No. 98-1-00610-5 Court of Appeals No. 19545-7-III VERBATIM REPORT OF PROCEEDINGS

MORNING SESSION OCTOBER 4, 2000

* * *

JUDGE SPERLINE: Let me first say that – I think the defense argument and the theory that's presented is well crafted and well thought out and it's frankly sensible, but ultimately, and I don't mean this in any way disrespectfully, it ends up chasing its tail for reasons I will expiain.

In the case of *Apprendi v. New Jersey* the United states Supreme Court was confronted with a situation where the defendant was convicted of an unlawful possession of firearm crime which carried a maximum penalty of, I believe it was, five to 10 years under their sentencing system. However, under New Jersey law, under a different statute called the hate crime statute, the court, the sentencing judge found that the crime was committed with a state of mind prescribed by that hate crime statute, that the sentencing range increased so that it was no longer five to 10 but became 10 to 20, which was identical with a higher degree of unlawful possession of a firearm.

I think, if I recall correctly, it would be the defendant would end up being convicted of unlawful possession of a firearm in the second degree and end up being sentenced to a sentence that he would have received were he convicted of unlawful possession of a firearm in the first degree. That case was decided just June 26 of this year, less than, what is that 4 months ago, and yet it has been discussed in a host of federal cases since that time.

Those cases have, with little exception, taken the position that the holding in *Apprendi* was narrow and that it turned on two circumstances. The first of those being that the result under the New Jersey statute required the application of two different statutes, one of which was charged in the charging document and one of which was not. And secondly, that the range ended up, by application of the hate crime statute, being increased beyond what would have been imposable under a jury verdict returned on what was charged in the Information. Neither of those circumstances are present in the case that's now before this court.

From the official syllabus to *Apprendi* here's what the decision is described as doing. It says:

> In light of the constitutional rule expressed here, New Jersey's practice cannot stand. it allows a jury to convict a defendant of a second degree offense on its finding beyond a reasonable doubt and then allows a judge to impose punishment identical to that which New Jersey provides for first degree crimes on his finding, by a preponderance of the evidence that the defendant's purpose was to intimidate his victim based on the victim's particular characteristic.

Skipping some language, it goes on to say:

> The degree of culpability the legislature associates with factually distinct conduct has significant implications both for a defendant's liberty and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment.

In chronologicai order, the first case that I thought was helpful decided after *Apprendi* was from the Southern District of California, *United States v. Kelly*, decided on July 14, 2000, in which the court explained as follows and I quote:

> The *Apprendi* court confronted an admittedly narrow issue. The case involved two independent state statutes working in tandem, not one statutory section as in *Jones* and *Castillo*. The first statute punishes possession of a firearm for an unlawful purpose by imprisonment for between five and 10 years. The second statute, known as a hate crime law, increases the sentencing range to between 10 and 20 years if the trial judge finds by a preponderance of the evidence that the defendant acted with a purpose to intimidate an individual or group of individuals because of race. . . .

Under that statute in *Apprendi* the defendant was sentenced to 12 years. In *Kelly* the court points out that -- Justice O'Connor and Thomas I think in one case dissenting and in one concurring opinion, make clear:

> That the majority establishes a narrow bright line rule that turns exclusively on whether the relevant factor increases the penalty beyond the prescribed statutory maximum.

We begin to see a divergence between *Apprendi* and this case, that is the Blakely case, because in Mr. Blakely's case the court is bound by the statutory maximum for his crime of conviction and we're talking about where beneath that statutory maximum his sentence should fall.

In *United States v. Aguayo-Delgado*, decided on July 18 in the Eighth Circuit united states court of Appeals, the court says the rule of *Apprendi*, that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt only applies where the nonjury factual determination increases the maximum sentence beyond the statutory range authorized by the jury's verdict. if the nonjury factual determination only narrows the sentencing judge's discretion within the range already authorized by the offense of conviction, then the governing constitutional standard is provided by *McMillan*, which allows the legislature to raise the minimum penalty associated with a crime based on nonjury factual findings as long as the penalty is within the range specified for the crime for which the defendant was convicted by the jury.

I won't cite from it, but the next case is similar and it is *United States v. Smith*, decided August 17 of this year in the seventh circuit.

On that same day the Third Circuit United States Court of Appeals decided *United States v. Scepro* in which it is noted:

> Because application of the sentencing guidelines in this case does not implicate a fact that would increase the penalty of a crime beyond the statutory maximum, the teachings of *Apprendi v. New Jersey* are not relevant here.

The United States District Court for New Jersey decided *Doe v. United States* on August 23rd and I quote from that decision:

> In *Apprendi*, the Supreme Court overturned a sentencing scheme that allowed a state judge, by a preponderance of the evidence, to enhance a defendant's penalty beyond the prescribed statutory maximum sentence. The enhanced sentence was similar to the sentence for first degree unlawful possession, although petitioner had only been charged and convicted of the second degree offense. Petitioner's case does not fall within the *Apprendi* ruling. First, petitioner was not sentenced beyond the statutory maximum. According to 21 U.S.C. section 841, where five kilograms or more of cocaine are attributed to the defendant, "such person shall be sentenced to a term of imprisonment which may not be more than 10 years or more than life." Petitioner does not contest his participation in an offense involving at least five kilograms of cocaine, and his sentence of 151 months is clearly within the statutory boundaries. Furthermore, petitioner was not sentenced under an additional statute, not referenced in the indictment and plea agreement, as the case was in *Apprendi*. In *Apprendi*, the defendant was given no notice that his admission of guilt on one count subjected him to the penalties of another statute. Petitioner, in the instant case, pled guilty to violating 21 U.S.C. sections 841, 846 and was sentenced under these sections only.

I note that the same really is true of the case that's -- this case, the Blakely case -- on August 24th the Sixth Circuit decided

United States v. Corrado in which they say because the district court did not sentence either defendant to a term of more than 20 years on the RICO counts, *Apprendi* is not triggered and the existence of a murder conspiracy did not have to be decided by a jury under the reasonable doubts standard.

The same holding is found -- is used by the Fifth Circuit, the same reasoning I should say, by the Fifth Circuit in *U.S. v. Meshack*, August 28 of this year in which, after describing the offense of conviction and a jury verdict, the court says quote:

> The minimum statutory range for this offense was zero to 20 years. See 21 U.S.C. section 841(a)(1). As his 168 month sentence was within this range it was permissible because the defendant's sentence was not enhanced beyond the statutory range based on a fact not contained in the indictment or presented to the jury.

The Ninth Circuit, in which we do business, decided *U.S. v. Hernandez-Guardado*, on September 7th, less than a month ago, and their finding is similar, also their description of the narrowness in the holding of *Apprendi*.

The Ninth Circuit on September 11 decided *U.S. v. Nordby* in which they point out from the *Apprendi* decision:

> We do not overrule *McMillan*. we limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict, a limitation identified in the *McMillan* opinion itself.

Citing from the *Apprendi* decision at 120 Supreme Court page 2361.

That those cases are an appropriate reading of *Apprendi* seems clear to me when I consider what it is that the defense in this case would have the court do, would have the law be, if you will, based on *Apprendi*. And as I see it, the defense is asking that the court require three things because of *Apprendi* in order to impose an exceptional sentence beyond the standard range.

Those three things are that the finding of those aggravating factors would have to be based upon a standard of proof beyond a reasonable doubt. Secondly, that it would have to be made, unless waived, by a jury as opposed to a sentencing judge. And third, those factors would have to be charged in the Information before the evidence was presented.

And that is the point at which the argument, in my opinion, logically chases its tail because in this case the defendant's guilt was established by a plea, but in many cases it would be established only by a trial with a full airing of the facts and a full finding by the jury. In either event, the state would be unable to necessarily allege in its charging information those facts which later developed to justify an exceptional sentence, or, for that matter, a mitigated sentence. And the reason that the state is not required to do that arises from these decisions themselves because the sentence imposed or proposed to be imposed in this case is within the sentence authorized by the legislature for conviction of what is charged in the Information, unlike *Apprendi* where the sentence of 12 years was not within the statutory maximum for what was alleged in the Information.

And here, with this view of *Apprendi*, then we have a situation in which not only is logic served and the practical requirements of the criminal justice system, but also the

Sentence Reform Act emerges as a constitutional requirement, a constitutional set of sentencing standards that gives the defendant notice of what his maximum punishment could be and from which maximum an exceptional sentence does not vary.

At the time of making a guilty plea the defendant acknowledges that the court is not bound by the recommendations made and that the defendant could be sentenced to anything that is allowed by law in regard to the crime of conviction or the crime to which he pleads. And in terms of just the operation of the system itself, the Sentence Reform Act is intended to structure but not eliminate the discretion of a sentencing judge. And the defense view of what is now required would frankly eliminate a substantial area of discretion extended by the legislature to the sentencing judge consistent with the practices of both the judicial and the legislative branches since the beginnings of our state and nation.

It seems to me then that the requirements of *Apprendi* do not apply to a case in which the court proposes to sentence the defendant within the maximum standard range, in this case 10 years, adopted by the legislature and proscribed as the appropriate level of punishment for this offense.

I believe that this court was mistaken in proposing to sentence Mr. Blakely to an exceptional sentence based upon a victim impact statement which was not made under oath and which was not subject to cross examination, but that the correct response to that is to conduct a hearing, a sentencing hearing under the statute in which testimony is presented and the defendant is given an opportunity to cross examine and to present evidence and the court, the judge without a jury, makes findings based upon that evidence on a standard of preponderance of the evidence as opposed to findings beyond a reasonable doubt. That conclusion I believe is supported by

the authorities in our state law and also by the decisions of the federal courts. And having reached that conclusion I would conclude that the defense motion should be denied.

60

SUPREME COURT OF WASHINGTON

State

v.

Howard R. Blakely

No. 72785-6
February 04, 2003

Appeal From: 19545-7-III, 111 Wash. App. 851, 47 P.3d 149

Petition for Review: Denied.

61

SUPERIOR COURT OF WASHINGTON
FOR GRANT COUNTY

STATE OF WASHINGTON, Plaintiff, v. RALPH HOWARD BLAKELY, Defendant.	)	No. 98-1-00610-5 STATEMENT OF DEFENDANT ON PLEA OF GUILTY TO A FELONY (STTDFG)

1. My true name is RALPH HOWARD BLAKELY.

2. My age is 64. Date of birth is 6-3-36.

3. I went through the 12th grade.

4. I HAVE BEEN INFORMED AND FULLY UNDERSTAND THAT:

(a) I have the right to representation by a lawyer, and that if I cannot afford to pay for a lawyer, one will be provided at no expense to me. My lawyer's name is Doug Phelps.

(b) I am charged with

COUNT	CRIME with RCW
1	KIDNAPPING IN THE SECOND DEGREE, DOMESTIC VIOLENCE, RCW 9A.40.030(1), 10.99.020 & RCW 9.94A.125 (CRIME CODE 00655)
2	~~KIDNAPPING IN THE SECOND DEGREE, DOMESTIC VIOLENCE, RCW 9A.40.030(1) & 10.99.020 (CRIME CODE 00655)~~ SECOND DEGREE ASSAULT [initialed]

The elements of the crime(s) are:

COUNT 1:

(1) That on or about October 26, 1998, the defendant intentionally abducted another person;

(2) That the defendant restrained that person by secreting or holding the person in a place where that person was not likely to be found or using or threatening to use deadly force;

(3) That the defendant was armed with a deadly weapon; and

(4) That the acts occurred in Grant County, Washington.

COUNT 2:

(1) That on or about October 26, 1998, the defendant intentionally ~~abducted~~ assaulted another person; with a deadly weapon, to wit: a gun. [initialed]

(2) ~~That the defendant restrained that person by secreting or holding the person in a place where that person was not likely to be found or using or threatening to use deadly force; and~~

(3) That the acts occurred in Grant County, Washington.

5. I UNDERSTAND THAT I HAVE THE FOLLOWING IMPORTANT RIGHTS, AND I GIVE THEM ALL UP BY PLEADING GUILTY:

(a) The right to a speedy and public trial by an impartial jury in the county where the crime is alleged to have been committed;

(b) The right to remain silent before and during trial, and the right to refuse to testify against myself;

(c) The right at trial to hear and question the witnesses who testify against me.

(d) The right at trial to testify and to have witnesses testify for me. These witnesses can be made to appear at no expense to me;

(e) I am presumed innocent unless the charge is proven beyond a reasonable doubt or I enter a plea of guilty.

(f) The right to appeal a finding of guilt after a trial.

6. IN CONSIDERING THE CONSEQUENCES OF MY GUILTY PLEA, I UNDERSTAND THAT:

(a) Each crime with which I am charged carries a maximum sentence, a fine, and a STANDARD SENTENCE RANGE as follows:

COUNT NO.	STANDARD RANGE (not including enhancements)	Plus Enhancement for Firearm (F), other deadly weapon (D) or VUSCA (V) in protected zone	Total STANDARD RANGE (including enhancement)	MAXIMUM TERM AND/OR FINE
1	13-17 mos.	F (36 m)	49-53 mos.	10 years
2	13-17 mos.	N/A	13-17	10 years

(b) The standard sentencing range is based on the crime charged and my criminal history. Criminal history includes prior convictions and juvenile adjudications or

convictions, whether in this state, in federal court, or elsewhere.

(c) The prosecuting attorney's statement of my criminal history is:

CRIME		DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J	TYPE OF CRIME
1	Grand Larceny Washes	Unk	Bozeman, MT	12-6-54	A	NV
2	Petty Larceny	Unk	Aurora, CO	11-8-63	A	Unk
3	Assault/Contempt Of Court	Unk	Littleton, CO	8-17-66	A	Unk
4	Larceny	Unk	Big Horn County, WY	5-5-69	A	NV
5	Kidnapping Washes	Unk	Powell, WY	5-14-69	A	V
6	False Income Tax Return, Conspiracy Subscribe False Income Tax Return	Unk	Spokane, WA	6-3-87	A	Unk

Unless I have attached a different statement, I agree that the prosecuting attorney's statement is correct and complete. If I have attached my own statement, I assert that it is correct and complete. If I am convicted of any additional crimes between now and the time I am sentenced, I am obligated to tell the sentencing judge about those convictions.

(d) If I am convicted of any new crimes before sentencing, or if any additional criminal history is discovered, both the standard sentence range and the prosecuting attorney's recommendation may increase. Even so, my plea of guilty to this charge is binding upon me. I cannot change my mind if

additional criminal history is discovered even though the standard sentencing range and the prosecuting attorney's recommendation increase or a mandatory sentence of life imprisonment without the possibility of parole is required by law.

(e) In addition to sentencing me to confinement; the judge will order me to pay $500.00 as a victim's compensation fund assessment. If this crime resulted in injury to any person or damage to or loss of property, the judge will order me to make restitution, unless extraordinary circumstances exist which make restitution inappropriate. The amount of restitution may be up to double my gain or double the victim's loss. The judge may also order that I pay a fine, court costs, and attorney fees and the costs of incarceration.

(f) In addition to sentencing me to confinement, the judge may order me to serve up to one year of community supervision if the total period of confinement ordered is less than 12 months and community custody or community placement is not required due to the nature of the crime. If this crime is a drug offense, assault in the second degree, assault of a child in the second degree, or any crime against a person in which a specific findings was made that I or an accomplice was armed with a deadly weapon, the judge will order me to serve at least one year of community placement. If this crime is a vehicular homicide, vehicular assault, or a serious violent offense, the judge will order me to serve at least two years of community placement. If this crime is a sex offense, the court will order me to serve at least three years of community custody. During the period of community placement, community custody, or community supervision, I will be under the supervision of the Department of Corrections, and I will have restrictions placed on my activities. My failure to comply with these conditions will render me ineligible for general assistance RCW 74.040.005(6(h).

(g) The prosecuting attorney will make the following recommendation to the judge:

Prosecutor recommends the high end of the sentencing range. Pay restitution should any be owed.

(h) The judge does not have to follow anyone's recommendation as to sentence. The judge must impose a sentence within the standard sentence range unless the judge finds substantial and compelling reasons not to do so. If the judge goes outside the standard range either the State or I can appeal that sentence. If the sentence is within the standard range, no one can appeal the sentence.

(i) If I am not a citizen of the United states, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

(j) I understand that I may not possess, own, or have under my control any firearm unless my right to do so is restored by a court of record and that I must immediately surrender any concealed pistol license. RCW 9.41.040

NOTIFICATION RELATING TO SPECIFIC CRIMES: IF ANY OF THE FOLLOWING PARAGRAPHS DO NOT APPLY, THEY SHOULD BE STRICKEN AND INITIALED BY THE DEFENDANT AND THE JUDGE

(k) This offense is a most serious offense or strike as defined by RCW 9.94A.030, and if I have at least two prior convictions for most serious offenses, whether in this state, in federal court, or elsewhere, the crime for which I am charged carries a mandatory sentence of life imprisonment without the possibility of parole. In addition, if this offense is (1) rape in the first degree, rape of a child in the first degree, rape in the

second degree, rape of a child in the second degree, indecent liberties by forcible compulsion, or child molestation in the first degree, or (2) murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, or burglary in the first degree, with a finding of sexual motivation, or (3) any attempt to commit any of the crimes listed in this sentence, and I have at least one prior conviction for one of these listed crimes in this state, in federal court, or elsewhere, the crime for which I am charged carries a mandatory sentence of life imprisonment without the possibility of parole.

(l) ~~The judge may sentence me as a first time offender instead of giving a sentence within the standard range, if I qualify under RCW 9.94A.030. This sentence could include as much as 90 days' confinement, two years community supervision, plus all of the conditions described in paragraph (e). Additionally, the judge could require me to undergo treatment, to devote time to a specific occupation, and to pursue a prescribed course of study or occupation training.~~ [Initialed]

(m) ~~The judge may suspend execution of the standard range term of confinement under the special sex offender sentencing alternative (SSOSA) if I qualify under RCW 9.94A.120(8). If the judge suspends execution of the standard range term of confinement, I will be placed on community custody for the length of the suspended sentence or three years; whichever is greater. I will be ordered to serve up to 180 days of total confinement, I will be ordered to participate in sex offender treatment, and I will be subject to all of the conditions described in paragraph (e). Additionally, the judge could require me to devote time to a specific occupation, and to pursue a prescribed course of study or occupational training. If a violation of the sentence occurs during~~

~~community custody, the judge may revoke the suspended sentence.~~ [Initialed]

(n) ~~Because this crime involves a sex offense or a kidnapping offense involving a minor, I will be required to register with the sheriff of the county of the state of Washington where I reside. If I am not a resident of Washington, but am I am a student in Washington or I am employed in Washington or I carry on a vocation in Washington, I must register with the sheriff of the county of my school, place of employment, or vocation. I must register immediately upon being sentenced unless I am in custody in which case I must register at the time of my release with the person designated by the agency that has me in custody and I must also register within 24 hours of my release with the sheriff of the county of the state of Washington where I will be residing, or if not residing in the state of Washington, where I am a student, where I am employed or where I carry on a vocation.~~ [Initialed]

~~If I leave this state following my sentencing or release from custody but later move back to Washington, I must register within 30 days after moving to this state or within 24 hours after doing so if I am under the jurisdiction of this state's Department of Corrections. If I leave this state following my sentencing or release from custody, but later, while not a resident of Washington, I become employed in Washington, carry out a vocation in Washington, or attend school in Washington, I must register within 30 after attending school in this state, or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if I am under the jurisdiction of the state's Department of Corrections.~~

~~If I change my residence within a county, I must send written notice of my change of residence to the sheriff within 72 hours of moving. If I change my residence to a new county within this state, I must send written notice of my change of~~

~~address at least fourteen days before moving to the county sheriff in the new county of residence. I must register with the sheriff of the new county within 24 hours of moving, and I must also give written notice of my change of address to the sheriff of the county where last registered within 10 days of moving. If I move out of Washington state, I must also send written notice within 10 days of moving to the new state or foreign country to the county sheriff with whom the person last registered in Washington state.~~

~~If I am a resident of Washington and I am admitted to a public or private institution of higher education, I shall, within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier, notify the sheriff of the county of my residence of my intent to attend the institution.~~

~~If I lack a fixed residence, I am required to register. Registration must occur within 24 hours of release in the county where I am being supervised if I do not have a residence at the time of my release from custody or within 14 days after ceasing to have a fixed residence. If I enter a different county and stay there for more than 24 hours, I will be required to register in the new county. I must also report in person to the sheriff of the county where I am registered on a weekly basis if I have been classified as a risk level II or III or on a monthly basis if I have been classified as a risk level I. The lack of a fixed residence is a factor that may be considered in determining a sex offender's risk level.~~ [Initialed]

(o) If this crime involves a sex offense or a violent offense, I will be required to provide a sample of my blood for purposes of DNA identification analysis.

(p) If this is a crime of domestic violence and if I, or the victim of the offense, has a minor child, the court may order me to participate in a domestic violence perpetrator program approved under RCW 26.50.150.

(q) ~~If this crime involves a sexual offense, prostitution, or a drug offense associated with hypodermic needles, I will be required to undergo testing for the human immunodeficiency (AIDS) virus.~~ [Initialed]

(r) ~~The judge may sentence me under the special drug offender sentencing alternative (DOSA) if I qualify under RCW 9.94A.120(6). This sentence could include a period of total confinement in a state facility for one-half of the midpoint of the standard range plus all of the conditions described in paragraph (e). During confinement, I will be required to undergo comprehensive substance abuse assessment and to participate in treatment. The judge will also impose community custody of at least one-half of the midpoint of the standard range that must include appropriate substance abuse treatment, a condition not to use illegal controlled substances, and requirement to submit to urinalysis or other testing to monitor that status. Additionally, the judge could prohibit me from using alcohol or controlled substances, require me to devote time to a specific employment or training, stay out of certain areas, pay thirty dollars per month to offset the cost of monitoring and require other conditions, including affirmative conditions.~~ [Initialed]

(s) ~~If the judge finds that I have a chemical dependency that has contributed to the offense, the judge may order me to may order me to participate to rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which I am pleading guilty.~~ [Initialed]

(t) ~~If this crime involves the manufacture, delivery, or possession with the intent to deliver methamphetamine or amphetamine, a mandatory methamphetamine clean-up fine of $3,000.00 will be assessed. RCW 69.50.401(a)(1)(ii).~~ [Initialed]

(u) ~~If this crime involves a motor vehicle, my driver's license or privilege to drive will be suspended or revoked. If I have a driver's license, I must now surrender it to the judge.~~ [Initialed]

(v) ~~If this crime involves the offense of vehicular homicide while under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, committed on or after January 1, 1999, an additional two years shall be added to the presumptive sentence for vehicular homicide for each prior offense as defined in RCW 46.61.5055(8).~~ [Initialed]

(w) ~~The crime of has a mandatory minimum sentence of at least _ years of total confinement. The law does not allow any reduction of this sentence. This mandatory minimum sentence is not the same as the mandatory sentence of life imprisonment without the possibility of parole described in paragraph 6(k).~~ [Initialed]

(x) ~~I am being sentenced for two or more serious violent offenses arising from separate and distinct criminal conduct and the sentences imposed on counts and will run consecutively unless the judge finds substantial and compelling reasons to do otherwise.~~ [Initialed]

(y) I understand that the offense(s) I am pleading guilty to include a deadly weapon or firearm enhancement. Deadly weapon or firearm enhancements are mandatory, they must be served in total confinement and they must run consecutively to any other sentence and to any other deadly weapon or firearm enhancements.

(z) ~~I understand that the offenses I am pleading guilty to include both a conviction under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and one or more convictions for the felony crimes of theft of a firearm or possession of a stolen firearm. The sentences~~

~~imposed for these crimes shall be served consecutively to each other. A consecutive sentence will also be imposed for each firearm unlawfully possessed.~~ [Initialed]

(aa) This plea of guilty will result in the suspension of public assistance. RCW 74.08-290

7. I plead guilty to COUNT 1 of the Second Amended Information. I have received a copy of that information.

I plead guilty to COUNT 2 of the Second Amended Information. I have received a copy of that information.

8. I make this plea freely and voluntarily.

9. No one has threatened harm of any kind to me or to any other person to cause me to make this plea.

10. No person has made promises of any kind to cause me to enter this plea except as set forth in this statement.

11. The judge has asked me to state briefly in my own words what I did that makes me guilty of this crime(s). This is my statement:

> Alford plea accepted for benefit of bargain only understanding that should the case proceed to trial you could be convicted based upon police reports and witness testimony. [Initialed]

☑ Instead of making a statement, I agree that the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea.

Driver's License and Firearm Permit. The defendant advises the court as follows:

I ☐ have ☑ do not have a Washington State Driver's License.

If so: My license number is: _____
Present location of license is: _____

I ☐ have ☑ do not have a Washington State Identicard

If so: Present location of Identicard is: _____

I ☐ have ☑ do not have a permit to carry a firearm

If so: My permit number is: _____
Present location of permit is: _____

12. My lawyer has explained to me, and we have fully discussed, all of the above paragraphs. I understand them all. I have been given a copy of "Statement of Defendant on Plea of Guilty." I have no further questions to ask of the judge.

/s/ _____

I have read and discussed this statement with the defendant and believe that the defendant is competent and fully understands the statement.

_____
John Knodell
WSBA #11284
(Deputy) Prosecuting Attorney

/s/ _____
Doug Phelps, WSBA #22620
Defendant's Lawyer

The foregoing statement was signed by the defendant in open court in the presence of the defendant's lawyer and the

undersigned judge. The, defendant asserted that (check appropriate box):

☑ (a) The defendant had previously read the entire statement above and that the defendant understood it in full; or

☐ (b) The defendant's lawyer had previously read to him or her the entire statement above and that the defendant understood it in full; or

☐ (c) An interpreter had previously read to the defendant the entire statement above and that the defendant understood it in full.

I find the defendant's plea of guilty to be knowingly, intelligently and voluntarily made. Defendant understands the charges and the consequences of the plea. There is a factual basis for the plea. The defendant is guilty as charged.

Dated: July 18, 2000.

/s/
EVAN E. SPERLINE, JUDGE

SUPERIOR COURT OF WASHINGTON
FOR GRANT COUNTY

STATE OF WASHINGTON, Plaintiff, v. HOWARD RALPH BLAKELY, Defendant.	No. 98-1-00610-5 SECOND AMENDED INFORMATION

JOHN D. KNODELL, Prosecuting Attorney for Grant County, State of Washington, by this Second Amended Information accuses:

HOWARD RALPH BLAKELY

of the crime(s) of

COUNT 1: KIDNAPPING IN THE SECOND DEGREE, DOMESTIC VIOLENCE, RCW 9A.030(1), RCW 10.99.020 & RCW 9.94A.125 (CRIME CODE 00655)

COUNT 2: ASSAULT IN THE SECOND DEGREE, DOMESTIC VIOLENCE, RCW 9A.36.021(1)(c) & 10.99.020 (CRIME CODE 01035)

committed as follows:

COUNT 1: That the said HOWARD RALPH BLAKELY in the County of Grant, State of Washington, on or about October 26, 1998, did intentionally abduct Yolanda Blakely, a human being. The defendant being at said time armed with a deadly weapon, under provision of RCW 9.94A.125.

COUNTY 2: That the said HOWARD RALPH BLAKELY in the County of Grant, State of Washington, on or about October 26, 1998, did assault Ralphy Blakely, a human being, with a deadly weapon, to wit: a gun;

(Penalty: 10 years and/or $20,000 as to each count)

contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Washington.

DATED at Ephrata, Washington, July 18, 2000.

/s/
John Knodell, WSBA #11284
(Deputy) Prosecuting Attorney

701

Supreme Court, U.S.
FILED
DEC 4 - 2003
OFFICE OF THE CLERK

No. 02-1632

IN THE
Supreme Court of the United States

RALPH HOWARD BLAKELY, JR.
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

On Writ of Certiorari to the
Washington Court of Appeals, Division III

BRIEF FOR PETITIONER

JEFFREY L. FISHER
Counsel of Record
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150

QUESTION PRESENTED

Whether a fact (other than a prior conviction) necessary for an upward departure from a *statutory* standard sentencing range must be proved according to the procedures mandated by *Apprendi v. New Jersey,* 530 U.S. 466 (2000).

TABLE OF CONTENTS

QUESTION PRESENTED i
BRIEF FOR PETITIONER 1
OPINIONS BELOW 1
STATEMENT OF JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 2
A. Washington's Sentencing Reform Act 2
B. Petitioner's Case 4
SUMMARY OF ARGUMENT 10
ARGUMENT 13
I. Washington's Procedures for Imposing Exceptional Sentences Upward Contravene the Plain Terms of the *Apprendi* Rule 13
A. The Way that Washington's Exceptional Sentence System Operates, Not the Labels It Uses, Is Dispositive. 16
B. *McMillan v. Pennsylvania*'s Analysis Regarding Mandatory Minimum Sentences Does Not Apply Here. 19
II. The Exceptional Sentence Imposed Here Highlights the Practical and Structural Concerns Underlying *Apprendi*. 21
CONCLUSION 26

TABLE OF AUTHORITIES

Cases:

Addington v. Texas, 441 U.S. 418 (1979) 24
Apprendi v. New Jersey, 530 U.S. 466 (2000) ..... passim
Duncan v. Louisiana, 391 U.S. 145 (1968) 24
Harris v. United States, 536 U.S. 545 (2002) 13, 19
In re Winship, 397 U.S. 358 (1970) 24
Jones v. United States, 526 U.S. 227 (1999) 15
Koon v. United States, 518 U.S. 81 (1996) 3
McMillan v. Pennsylvania, 477 U.S. 79 (1986) 11, 15, 19, 20
Mistretta v. United States, 488 U.S. 361 (1989) 23
Mullaney v. Wilbur, 421 U.S. 684 (1975) 16
People v. Reese, 258 N.Y. 89 (1932) 24
Ring v. Arizona, 536 U.S. 584 (2002) ..... passim
State v. Ammons, 105 Wn.2d 175, 713 P.2d 719 (1986) 22
State v. Dunivan, 57 Wn. App. 332, 788 P.2d 576 (1990) 3
State v. Falling, 50 Wn. App. 47, 747 P.2d 1119 (1987) 4
State v. Gore, 143 Wn.2d 288, 21 P.3d 262 (2001) ..... passim
State v. Gould, 23 P.3d 801 (Kan. 2001) 17
State v. Handley, 115 Wn.2d 275, 796 P.2d 1266 (1990) 4
State v. Pascal, 108 Wn.2d 125, 736 P.2d 1065 (1987) 22
State v. Pittman, 54 Wn.2d 58, 772 P.2d 516 (1989) 3
State v. Pittman, 54 Wn. App. 58, 772 P.2d 516 (1989) 3, 14
State v. Tongate, 93 Wn.2d 751, 613 P.2d 121 (1980) 5
United States v. Bigelow, 897 F.2d 160 (5th Cir. 1990) 3
United States v. Duran, 127 F.3d 911 (10th Cir. 1997) 3
United States v. Gonzales, 996 F.2d 88 (5th Cir. 1993) 3
United States v. Parker, 136 F.3d 653 (9th Cir. 1998) 3

United States v. Reese, 92 U.S. 214 (1876) 13

Statutes:

28 U.S.C. § 1257(a) 1
Wash. Rev. Code § 9.94A.010 2
Wash. Rev. Code § 9.94A.120(1) 2, 4, 13, 19
Wash. Rev. Code § 9.94A.120(2) 2, 4, 13, 19
Wash. Rev. Code § 9.94A.120(14) 15
Wash. Rev. Code § 9.94A.125 5
Wash. Rev. Code § 9.94A.310(1) 2, 6, 10, 14, 22
Wash. Rev. Code § 9.94A.310(3)(b) 6, 10, 14, 22
Wash. Rev. Code § 9.94A.370(2) 4, 7, 14
Wash. Rev. Code § 9.94A.390 3
Wash. Rev. Code § 9.94A.390(2)(a) 2, 7
Wash. Rev. Code § 9.94A.390(2)(h)(ii) 7, 14
Wash. Rev. Code § 9.94A.390(2)(h)(iii) 7, 14
Wash. Rev. Code §§ 9.94A.505-35 (2002) 2
Wash. Rev. Code § 9.94A.505(11) 6
Wash. Rev. Code § 9.94A.589 7
Wash. Rev. Code § 9A.20.021 ..... 4, 15
Wash. Rev. Code § 9A.40.030 15
Wash. Rev. Code § 10.99.020(3) 6
Wash. Rev. Code § 10.99.040 6

Other Authority:

Bishop, J., New Criminal Procedure (2d ed. 1872) 13
Blackstone, William, Commentaries on the Laws of England (1768) 24

Fine, Seth A. & Ende, Douglas J., Washington Practice: Criminal Law (2d ed. 1998) 2
Rovella, David E., *A Looming* Apprendi *Tsunami?*, Nat. LJ., Jan 8, 2001, at A1 25

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Washington Court of Appeals is reported at 111 Wn. App. 851, 47 P.3d 149 (2002), and is reprinted at J.A. 2-23. The order of the Washington Supreme Court denying discretionary review of that decision is published at 148 Wn.2d 1010, 62 P.3d 889 (2003), and is reproduced at J.A. 60. The trial court's pertinent sentencing orders are unpublished and are reproduced at J.A. 24-58.

STATEMENT OF JURISDICTION

The Washington Supreme Court issued its order denying Petitioner's petition for review on February 4, 2003. J.A. 60. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

Relevant provisions of the Revised Code of Washington are reproduced at Pet. App. 51a-68a.

STATEMENT OF THE CASE

A. Washington's Sentencing Reform Act

Washington's "sentencing guidelines," in contrast to the federal guidelines, are a statutory enactment, known as the Sentencing Reform Act. The Washington Legislature passed the Act to implement "a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences." Wash. Rev. Code § 9.94A.010.[1] Under the State's prior indeterminate sentencing law, punishment was not always proportional to the severity of the offense; a "severe sentence," for example, "could be imposed for minor offenses, which was a waste of resources." 13B Seth A. Fine & Douglas J. Ende, Washington Practice: Criminal Law § 3406, at 275-76 (2d ed. 1998). The core of the Sentencing Reform Act, therefore, is a grid of relatively narrow "standard ranges," or "presumptive sentences," calculated according to the seriousness of the offense and the criminal history of the offender. *See* Wash. Rev. Code § 9.94A.310(1). (The relevant portions of the Sentencing Reform Act appear at Pet. App. 51a-64a).

The Act provides, subject to exceptions not relevant here, that when a person is convicted of a felony, a court "shall impose" a sentence within the standard range unless "it finds . . . substantial and compelling reasons justifying an exceptional sentence." §§ 9.94A.120(1)-(2). The Act then sets forth several "aggravating circumstances," such as manifesting deliberate cruelty and knowingly harming a vulnerable victim, §§ 9.94A.390(2)(a) & (b), that may supply a substantial and

[1] The Washington Legislature has recodified and amended various provisions of the Sentencing Reform Act since the trial court proceedings in this case. *See* Wash. Rev. Code §§ 9.94A.505-35 (2002). None of these changes alter the substantive Washington law relevant to this case in any relevant respect. For purposes of simplicity, this brief refers, as the courts below did, to the old statutory section numbers.

compelling reason to impose an exceptional sentence upward. Although these enumerated factors are "illustrative" rather than exclusive, § 9.94A.390, "[a] reason offered to justify an exceptional sentence can be considered *only if* it takes into account factors *other than those which are used in computing the standard range sentence for the offense*." *State v. Gore,* 143 Wn.2d 288, 315-16, 21 P.3d 262 (2001) (emphasis added); *accord State v. Pittman,* 54 Wn. App. 58, 61-62, 772 P.2d 516 (1989). In other words, a court may deviate upward from the standard sentencing range only on the basis of factual findings beyond those required by the elements of the underlying offense.[2] If a trial court imposes an exceptional sentence on the basis of a fact subsumed within the elements of the underlying offense or an otherwise improper aggravating factor, an appeals court will invalidate the exceptional sentence and require a sentence in the standard range. *See, e.g., State v. Dunivan,* 57 Wn. App. 332, 339, 788 P.2d 576 (1990); *State v. Pittman,* 54 Wn.2d 58, 61-62, 772 P.2d 516 (1989).

[2] This is one way in which Washington's statutory guidelines differ from the federal sentencing guidelines. The federal guidelines permit courts to depart upward from a presumptive range based on a fact subsumed within an element of an offense if that fact is present "to an exceptional degree." *Koon v. United States,* 518 U.S. 81, 96 (1996). The federal guidelines also frequently direct courts to "double count" an element of an offense, even if it is not present to an exceptional degree, by enhancing a defendant's "offense level" (and, thereby, his ultimate sentence) on the basis of a fact that is already subsumed within the offense of conviction. *See, e.g., United States v. Parker,* 136 F.3d 653 (9th Cir. 1998) (defendant convicted of failure to surrender for service of a sentence; upholding enhancement for committing offense under a criminal justice sentence); *United States v. Duran,* 127 F.3d 911, 916-19 (10th Cir. 1997) (defendant convicted of assault with a dangerous weapon; upholding enhancement for use of a dangerous weapon). In permitting double counting in this manner, the federal courts of appeal have reasoned that Congress intended to allow the Federal Sentencing Commission to calibrate sentencing rules however it wishes, so long as the ultimate sentences are below or equal to the statutory maximums. *See, e.g., United States v. Gonzales,* 996 F.2d 88, 93-94 (5th Cir. 1993); *United States v. Bigelow,* 897 F.2d 160, 161-62 (5th Cir. 1990).

If the State decides to seek an exceptional sentence upward in a particular case, it need not make factual allegations supporting that request in the charging instrument. In fact, even if the State never requests an exceptional sentence at all, the trial judge is still free to impose one *sua sponte* at sentencing. *See, e.g., State v. Falling,* 50 Wn. App. 47, 52, 747 P.2d 1119 (1987). But whether the State requests an exceptional sentence upward or the trial court raises the issue on its own, judges (not juries) find the aggravating facts supporting such heightened punishment. *See* §§ 9.94A.120(2)-(3). Such findings need be made only "by a preponderance of the evidence." § 9.94A.370(2); *Gore,* 143 Wn.2d at 315. Furthermore, when a court holds a sentencing hearing to determine whether to impose an exceptional sentence upward, the usual rules of evidence "need not be applied." Wash. R. Evid. 1101(c)(3). The court may admit hearsay and other evidence that would normally be excluded during a trial, so long as it perceives "some basic level of reliability of what is presented." Report of Proceedings at 595; *see generally State v. Handley,* 115 Wn.2d 275, 281, 796 P.2d 1266 (1990).

If a Washington court imposes an exceptional sentence upward, the Act also caps the extent to which the court may deviate from the standard range. "A court may not impose a sentence providing for a term of confinement . . . which exceeds the statutory maximum for the crime as provided in [§ 9A.20.021]." § 9.94A.120(14). The "statutory maximum," as defined in § 9A.20.021, sets upper limits depending on whether the offense of conviction is a class A felony (life in prison), class B felony (ten years), or class C felony (five years).

B. Petitioner's Case

1. Petitioner Ralph Howard Blakely, Jr. "has been diagnosed at various times since 1972 as suffering from schizophrenia." J.A. 5; *see also* J.A. 47 ¶¶ 26-27. He and his wife, Yolanda, separated in 1995, and later that year she filed

for divorce. Over the next two years, Yolanda sought to terminate the family trust and to terminate Petitioner's control over certain jointly held properties. J.A. 40 ¶ 2.

In 1998, according to factual findings later made by the trial court, Petitioner, while armed with a knife, abducted his wife from their home in Washington and drove her toward another of the family's properties in Montana. Petitioner ordered their teenage son, Ralphy, to follow them in another car. Petitioner told Ralphy that he had a gun in his car and that if Ralphy "tried anything," he would use it. J.A. 43 ¶ 13. During parts of the drive Petitioner forced his wife to ride in a wooden box in the bed of his pick-up truck; at other times she rode in the passenger seat.

Petitioner told his wife during these actions that he was doing this because he wanted her to dismiss the divorce action and the litigation over the trust. J.A. 41-42 ¶ 7. To that end, he called his daughter while in transit and told her to call "the lawyers" and to direct them to stop the divorce and trust litigation. J.A. 46 ¶ 24. The ordeal ended the next day when Petitioner stopped at a friend's house, and the friend surreptitiously telephoned the police. J.A. 46 ¶¶ 23-24.

The State filed an information charging Petitioner with two counts of first degree kidnapping. It later amended the information to charge Petitioner with second degree kidnapping with a deadly weapon and second degree assault with a deadly weapon, both of which are class B felonies. (Deadly weapon enhancements in Washington are not separate crimes, but they must be pleaded in the information and proved to a jury beyond a reasonable doubt. *See* Wash. Rev. Code § 9.94A.125; *State v. Tongate,* 93 Wn.2d 751, 613 P.2d 121 (1980).) The body of the amended information reads in full:

> COUNT 1: That the said HOWARD RALPH BLAKELY in the County of Grant, State of Washington, on or about October 26, 1998, did intentionally abduct Yolanda Blakely, a human being. The defendant being at said time armed with a deadly weapon, under provision [Wash. Rev. Code. §] 9.94A.125.
>
> COUNT 2: That the said HOWARD RALPH BLAKELY in the County of Grant, State of Washington, on or about October 26, 1998, did assault Ralphy Blakely, a human being, with a deadly weapon, to-wit: a gun.

J.A. 75-76.

On July 18, 2000, Petitioner entered an *Alford* plea of guilty in the Superior Court of Washington for Grant County to second degree kidnapping with a deadly weapon and to second degree assault. J.A. 2, 61-74.[3] The plea did not contain any elaboration regarding the circumstances surrounding the offenses; Petitioner merely acknowledged that, at a trial, the State could prove the elements of the crimes to which he was pleading. *See* J.A. 72 ¶ 11. As part of the plea agreement, the State agreed to recommend a sentence in the high end of the standard range. J.A. 7, 28, 66. The standard range for the kidnapping charge (including a 36-month deadly weapon enhancement, *see* Wash. Rev. Code § 9.94A.310(3)(b)) is 49 to

[3] Petitioner's guilty plea also acknowledged that his crimes involved domestic violence because his wife was the victim. J.A. 24; Wash. Rev. Code § 10.99.020(3)(b) & (p) (requiring a finding of "domestic violence" when the victim of a kidnapping or assault is a member of the defendant's family). A "domestic violence" plea does not affect the length of offender's sentence but rather allows a sentencing court to issue directives such as "no contact" orders and orders requiring the offender to participate in a domestic violence perpetrator program. *See* Wash. Rev. Code §§ 9.94A.505(11) & 10.99.040; J.A. 31 ¶ 4.3 (issuing no contact order here).

53 months, and the standard range for the assault charge is 12 to 14 months. J.A. 7, 27 ¶ 2.3; § 9.94A.310(1) (grid boxes 2-V and 2-IV). Under Washington law, such sentences presumptively run concurrently. *See* § 9.94A.589.

Before imposing a sentence, the trial court asked Petitioner's wife to describe the circumstances underlying the crimes. The court also reviewed three psychological evaluations, one of which stated that Petitioner had abducted his wife as an "honest attempt" – misguided though it was – "to renew his family." Pet. App. 44a; *see also* J.A. 48 ¶ 31. After considering these presentations, the court noted that "[t]here has always been, in this case, a great deal of dispute about such things as [Petitioner's] mental condition at the time that these offenses occurred [and Petitioner's] motivation for doing what he did." Pet. App. 46a.

At the close of the sentencing hearing, the court *sua sponte* rejected the recommended sentence as "too lenient," Pet. App. 47a, and stated that it intended to deviate upward 37 months from the top of the standard range and impose an exceptional sentence of 90 months. The court stated that this upward deviation would be based on findings of (i) deliberate cruelty, which is a statutorily enumerated aggravating factor, § 9.94A.390(2)(a), and (ii) "domestic violence plus deliberate cruelty and commission within the sight or sound of the victim's minor child," which likewise is enumerated at § 9.94A.390(2)(h)(ii) & (iii). J.A. 7-8; *see also* Pet. App. 47a-50a (trial judge's oral explanation). Neither of these factors is subsumed within the elements of second degree kidnapping with a deadly weapon or second degree assault. Nor, as noted above, was either mentioned in the information.

Petitioner objected to the court's intended sentence. The Sentencing Reform Act provides that "[w]here the defendant disputes material facts, the court must either not consider the facts or grant an evidentiary hearing on the point."

§ 9.94A.370. The court thus continued the sentencing hearing and stated that it would hold an evidentiary hearing regarding whether to impose an exceptional sentence upward.

In response to the trial court's announced sentencing inclination and a subsequent brief from the State stating that an exceptional sentence upward would, in fact, be supported by law, Petitioner moved to withdraw his guilty plea. The court, however, denied that motion. Report of Proceedings 583-86. The court further held that the State's participation in the exceptional-sentence proceedings would not breach the plea agreement, since the State was not actually asking the court to reject the recommended standard-range sentence. J.A. 12-15.

Before the evidentiary hearing, Petitioner also filed a motion requesting a standard-range sentence and arguing that *Apprendi v. New Jersey,* 530 U.S. 466 (2000), prohibited the court from imposing an exceptional sentence upward without submitting the factual bases for the proposed aggravators to a jury and requiring these facts to be proved beyond a reasonable doubt. J.A. 13. The court rejected the *Apprendi* argument and went ahead with the evidentiary bench hearing. J.A. 51-58.

Following a three-day hearing involving several witnesses and medical experts, the trial court entered an order making factual findings and reaching legal conclusions. J.A. 40-50. The court found that Petitioner's "motivation to commit the kidnapping was complex, contributed to by his mental condition and personality disorders, the pressures of divorce litigation, the impending trust litigation trial and anger over his troubled interpersonal relationships with his spouse and children." J.A. 48 ¶ 31. The court further determined that Petitioner's "capacity to appreciate the wrongfulness of his conduct . . . was impaired by his personality disorders, but not significantly so." J.A. 49 ¶ 1. Turning to the statutory aggravating factors, the court concluded that Petitioner's "personality disorders did not significantly impair his capacity

to act with deliberate cruelty." *Id.* Accordingly, the court (again acting *sua sponte*) imposed the 90-month exceptional sentence for the kidnapping offense, to run concurrently with a 14-month standard sentence for the assault offense. J.A. 8, 32 ¶ 4.5, 49 ¶ 5.

2. The Washington Court of Appeals affirmed Petitioner's convictions and sentence. Addressing the exceptional sentence that the trial court imposed on the kidnapping charge, the court noted that a technicality in state law may have prevented the trial court from relying on bare "deliberate cruelty" as an aggravating factor. J.A. 17. But it ruled that this potential error was irrelevant because "the alternate basis of domestic violence with deliberate cruelty supports the exceptional sentence here." J.A. 18 n.4; *see also* Pet. App. 50a (trial court's indication that this factor "on its own" would justify exceptional sentence).

The court of appeals then rejected Petitioner's *Apprendi* argument. The court noted the Washington Supreme Court had held in *State v. Gore,* 143 Wn.2d 288, 21 P.3d 262 (2001), that "*Apprendi* does not apply to factual determinations that support reasons for exceptional sentences upward." J.A. 19. The *Gore* decision, therefore, foreclosed Petitioner's contention.

3. Petitioner sought discretionary review of this decision in the Washington Supreme Court. He argued, *inter alia*, that the procedures the trial court used in imposing the exceptional sentence on the kidnapping charge contravened *Apprendi*. Pet. App. 69a-70a. The Washington Supreme Court denied review without comment. J.A. 59.

4. This Court granted certiorari. 124 S. Ct. 429 (2003).

SUMMARY OF ARGUMENT

I. The procedures in Washington's Sentencing Reform Act for finding the "aggravating facts" necessary to impose an exceptional sentence upward violate the plain terms of the *Apprendi* rule. In *Apprendi,* this Court held that any fact that, "if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the [guilty] verdict alone" must be proved to a jury beyond a reasonable doubt. 530 U.S. 466, 483 (2000). Aggravating facts under the Act have this precise effect. By finding such a fact, a sentencing court may impose a sentence that is longer than the top of an otherwise mandatory statutory standard sentencing range. Yet the Act permits judges (not juries) to find aggravating facts, and the applicable standard is a preponderance of the evidence (not beyond a reasonable doubt).

In Petitioner's particular case, Wash. Rev. Code §§ 9.94A.310(1) & (3)(b) subjected him to a standard range of 49-53 months based on the facts encompassed in his guilty plea to second degree kidnapping with a deadly weapon. The trial court, however, found an aggravating fact – the commission of domestic violence with deliberate cruelty – that enabled it to impose a sentence that was 37 months longer than this 53-month statutory limit. In direct violation of *Apprendi*, this aggravating fact was neither pleaded in the information nor proved to a jury beyond a reasonable doubt.

In *State v. Gore,* 143 Wn.2d 288, 21 P.3d 262 (2001), the Washington Supreme Court advanced two justifications for upholding the State's exceptional sentence procedure, but neither withstands scrutiny. First, the Court asserted that because Washington law uses the term "statutory maximum" to describe the longest permissible *exceptional sentence* – instead of the longest permissible standard-range sentence – the presence of aggravating facts do not increase the "maximum"

allowable sentence for purposes of triggering *Apprendi*. But this argument ignores this Court's admonition that labels are irrelevant in the context of the constitutional inquiry required here. Rather, as this Court emphasized in *Ring v. Arizona*, 536 U.S. 584 (2002), the dispositive question is a functional one: what is the maximum penalty to which the defendant is subject if punished according to the facts reflected in the guilty verdict alone? That penalty in Washington is indisputably the upper limit in the applicable statutory standard range.

Second, the Washington Supreme Court stated that factual determinations underlying exceptional sentences upward are more like the determination at issue in *McMillan v. Pennsylvania,* 477 U.S. 79 (1986), than those covered by *Apprendi*. But *McMillan* applies only to facts necessary to impose a certain *minimum* sentence, and the aggravating facts at issue here – as in all exceptional sentences upward in Washington – do not dictate any minimum sentence. Rather, they allow the imposition of a sentence more severe than the statutory maximum for the offense established by the guilty verdict. As such, they are covered by *Apprendi,* not *McMillan.*

II. Even apart from a technical application of the *Apprendi* rule, several practical and structural aspects of the proceedings below show why it is vital that this Court hold firm to *Apprendi*'s insistence that any fact necessary to increase a defendant's sentence be alleged in advance and proven to a jury beyond a reasonable doubt. As an initial matter, *Apprendi* is designed to require that legislatures treat every fact they deem essential to a given prison term with equal gravity. Yet here, the finding of domestic violence plus deliberate cruelty accounted for the *largest* portion of Petitioner's sentence, while the Washington Legislature rendered that finding subject to the *slightest* procedural protections. *Apprendi* also is designed to ensure that any finding that subjects a defendant to an additional loss of liberty is made beyond a reasonable doubt – a standard that excludes as nearly

as possible the potentiality of an erroneous judgment. Yet here, the trial judge practically conceded that reasonable doubt existed as to whether Petitioner acted with deliberate cruelty and, thus, as to whether he deserved the 37-month increase in his sentence. Finally, *Apprendi* is designed to guarantee that someone accused of committing a crime be able to predict with certainty the punishment to which he is exposing himself by pleading guilty to an offense charged in an indictment. Yet here, the trial court, without even the State's backing, imposed a sentence more than three years longer than the statutory limit for the facts encompassed in the indictment and Petitioner's guilty plea, based on additional circumstances that Petitioner hotly disputed.

The central thrust of *Apprendi* is that it is wrong to convict someone of a certain crime and then to sentence him as if he actually committed a more serious transgression. Enforcing the *Apprendi* rule here will ensure that courts may not increase a defendant's punishment based on allegedly aggravating facts that he did not have fair notice of, and that he was not allowed to contest before a jury.

ARGUMENT

I. Washington's Procedures for Imposing Exceptional Sentences Upward Contravene the Plain Terms of the *Apprendi* Rule.

In *Apprendi v. New Jersey,* this Court held that any fact that subjects a defendant to a longer sentence than that "prescribed by the legislature," or the "statutory limit[]," must be charged in an indictment, submitted to a jury and proved beyond a reasonable doubt. 530 U.S. 466, 481-82 (2000). This holding conformed to "the principle by which history determined what facts were elements" of crimes – namely, any "fact . . . legally essential to the punishment to be inflicted." *Harris v. United States,* 536 U.S. 545, 561 (2002) (quoting *United States v. Reese,* 92 U.S. 214, 232 (1876) (Clifford, J., dissenting)); *see also Apprendi,* 530 U.S. at 502 ("common law understanding" was that "a fact that is by law the basis for imposing or increasing punishment is an element"); 1 J. Bishop, New Criminal Procedure 50 (2d ed. 1872) ("whatever in law is essential to the punishment sought to be inflicted" is an element).

This Court reaffirmed the *Apprendi* rule in *Ring v. Arizona,* 536 U.S. 584 (2002), in which it invalidated Arizona's method for finding "aggravating facts" that subjected offenders to the death penalty. Any fact that a state deems necessary for an increase in a defendant's punishment, this Court made clear, must be proved according to the procedures mandated by *Apprendi*. *Ring,* 536 U.S. at 588-59.

Washington's statutory scheme for finding the aggravating facts necessary for exceptional sentences upward has exactly the same infirmities as the Arizona scheme this Court invalidated in *Ring*. Wash. Rev. Code §§ 9.94A.120(1) & (2) direct sentencing courts to impose a sentence "within the sentence range for the offense" unless they find an aggravating

fact to be present. An aggravating circumstance, the Washington Supreme Court has explained, can be considered "only if it takes into account factors other than those which are used in computing the standard range sentence for the offense." *State v. Gore,* 143 Wn.2d 288, 315-16, 21 P.3d 262 (2001); *State v. Pittman,* 54 Wn. App. 58, 61-62, 772 P.2d 516 (1989) ("The reasons for imposing an exceptional sentence cannot include the factors inherent in the offense . . . ."; vacating exceptional sentence on this basis). In other words, just as in the Arizona scheme, the presence of an aggravating fact beyond the elements of the crime of conviction subjects the defendant to more severe punishment than otherwise is legally permissible. A court, rather than a jury, may find such a fact. And unlike even the aggravating facts necessary in *Ring,* aggravators in Washington are determined only "by a preponderance of the evidence," instead of beyond a reasonable doubt. Wash. Rev. Code § 9.94A.370(2); *Gore,* 143 Wn.2d at 315.

In Petitioner's particular case, Wash. Rev. Code §§ 9.94A.310(1) & (3)(b) subjected him to a presumptive sentencing range of 49-53 months – a legislatively prescribed statutory maximum of 53 months. J.A. 7, 16. Yet Petitioner's sentencing court found that an aggravating fact – "domestic violence plus deliberate cruelty and commission within the sight or sound of the victim's minor child," J.A. 15 (citing § 9.94A.390(2)(h)(ii) & (iii)) – that is not an element of Petitioner's offenses of conviction was present. Based on that factual finding, the court imposed, and the Court of Appeals affirmed, a sentence 37 months longer than the maximum that could be imposed for Petitioner's guilty plea to the elements of second degree kidnapping with a deadly weapon. J.A. 8.

This procedure constitutes a paradigmatic *Apprendi* violation. The court (rather than a jury) found certain facts by a preponderance (rather than beyond a reasonable doubt) that exposed Petitioner to a sentence exceeding that prescribed by

the Washington Legislature for the bare offense to which he pled guilty. *Apprendi* itself, in fact, noted that increasing a sentence based on a "second *mens rea* requirement" without submitting the issue to a jury is a classic violation because "[t]he defendant's intent in committing a crime is perhaps as close as one might come to a core criminal offense 'element.'" 530 U.S. at 493. The trial court's finding that Petitioner acted with deliberate cruelty plus domestic violence, J.A. 18 n.4, found a second *mens rea* fact (deliberate cruelty) that is not required for a violation of the second degree kidnapping statute. *See* Wash. Rev. Code § 9A.40.030 (kidnapping statute). It also found an additional *actus reus* fact (domestic violence in the presence of a child) that is not encompassed in that statute. Br. in Opp. at 14 (acknowledging this point); *compare Jones v. United States,* 526 U.S. 227 (1999) (fact such as inflicting serious bodily injury that increases maximum sentence must be treated as element of offense).

Despite the apparent clarity of the *Apprendi* infirmity in Washington's exceptional sentence system, the Washington Supreme Court ruled in *State v. Gore* that the system was constitutional for two reasons. First, the Court noted that Wash. Rev. Code § 9A.20.021 sets forth what the provision calls "maximum sentences" for the various classes of felonies, and that § 9.94A.120(14) prohibits courts from imposing an exceptional sentence "which exceeds th[ose] statutory maximum[s]." *Gore,* 143 Wn.2d at 313-14. Ergo, according to the Court, the procedures for finding aggravating facts do not violate *Apprendi* because the exceptional sentences they lead to do not exceed what Washington law has labeled the "statutory maximum." *Id.* at 314. Second, the Washington Supreme Court stated that factual determinations leading to exceptional sentences upward are more like the determination upheld in *McMillan v. Pennsylvania,* 477 U.S. 79 (1986), which dictated a mandatory minimum sentence, than those

covered by *Apprendi*. *Gore*, 143 Wn.2d at 314. Neither justification withstands scrutiny.

A. The Way that Washington's Exceptional Sentence System Operates, Not the Labels It Uses, Is Dispositive.

Washington cannot avoid the mandates of *Apprendi* simply by saying that the upper limit for an *exceptional sentence* is the only "statutory maximum" in its sentencing scheme. Constitutional protections, particularly in the context of *Apprendi*, do not turn based on where name tags are placed. As this Court recently explained:

> The dispositive question [under *Apprendi*] "is one not of form, but of effect." If a State makes an increase in a defendant's authorized punishment contingent on the finding of fact, that fact – *no matter how the State labels it* – must be found by a jury beyond a reasonable doubt.

Ring, 536 U.S. at 602 (quoting *Apprendi*, 530 U.S. at 494) (emphasis added); *see also Ring*, 536 U.S. at 610 (Scalia, J., concurring) ("[A]ll facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt."); *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975) (a state's "characteriz[ation]" of factors bearing on punishment does not control constitutional inquiry).

For this same reason, labeling makes no difference in determining whether a certain provision sets forth a "statutory maximum" for purposes of *Apprendi*. Rather, the dispositive question is a functional one: what is the maximum penalty to which the defendant is subject if punished "according to the

facts reflected in the jury verdict alone" or the guilty plea alone? *Apprendi*, 530 U.S. at 483[4]; *accord Ring*, 536 U.S. at 597. That penalty in Washington – as in other states with similar guideline systems – is indisputably "the maximum sentence *in the applicable grid box*." *State v. Gould*, 23 P.3d 801, 812-13 (Kan. 2001) (emphasis added). It does not matter that Washington uses the term "statutory maximum" to describe the longest permissible exceptional sentence instead of the longest permissible standard-range sentence.

In this regard as well, Washington's exceptional sentence procedure is just like the procedure that this Court invalidated in *Ring*. The Arizona first-degree felony murder statute "authorize[d] a maximum penalty of death . . . in a formal sense" because it noted that death was the maximum sentence available for that crime. 536 U.S. at 604 (quotation omitted); *see also id.* at 592. But "[b]ased solely on the jury's verdict finding [a defendant] guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment. [citations omitted]. This was so because, in Arizona, a death sentence may not legally be imposed . . . unless at least one aggravating factor is found to exist." *Id.* at 597 (quoting *State v. Ring*, 25 P.3d 1139, 1151 (Ariz. 2001)). This Court thus held that *Apprendi* governed the procedures for finding such an aggravating factor because otherwise, "*Apprendi* would be reduced to a 'meaningless and formalistic' rule of statutory drafting." *Id.* at 604.[5]

---

[4] The defendant in *Apprendi*, like Petitioner here, pled guilty to the underlying offense. *See* 530 U.S. at 469-70.

[5] Justice Thomas used similar reasoning in *Apprendi* itself in explaining that case's rule: "[A] 'crime' includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). Thus, if a legislature defines some core crime and then provides for increasing the punishment of that crime *upon a finding of some aggravating fact* – of whatever sort . . . – the core crime and the aggravating

Precisely the same analysis applies here. As the *Ring* Court itself explained, "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed factfinding necessary to increase a defendant's sentence *by two years*, but not the factfinding necessary to put him to death. *We hold that the Sixth Amendment applies to both.*" 536 U.S. at 609 (emphasis added); *see also id.* at 607 ("We see no reason to differentiate capital crimes from all others in this regard."); *Apprendi,* 530 U.S. at 544-51 (O'Connor, J., dissenting) (recognizing that *Apprendi* rule applies to facts necessary to impose death penalty as well as to impose an additional term of years). Indeed, the noncapital nature of the heightened sentence here makes this case, if anything, easier than *Ring.* As Justice Scalia noted in *Ring,* there was some doubt there, in light of this Court's Eighth Amendment jurisprudence, as to whether the Arizona Legislature voluntarily had made the imposition of the death penalty dependent on the finding of an aggravating fact. *See* 536 U.S. at 610-12 (Scalia, J., concurring). But here, there is no question that the Washington Legislature voluntarily created a statutory scheme under which defendants' sentences cannot exceed the top of the standard range unless an aggravating fact is present.

In short, because Washington courts may not legally deviate upward from the top of the sentencing range dictated by a guilty verdict alone "unless at least one aggravating factor is found to exist," *Ring,* 536 U.S. at 597, the procedures for finding such a factor must comply with *Apprendi.*

---

factor together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime" and must be submitted to the jury and proved beyond a reasonable doubt. 530 U.S. at 501 (Thomas, J., concurring) (emphasis added).

B. *McMillan v. Pennsylvania*'s Analysis Regarding Mandatory Minimum Sentences Does Not Apply Here.

The Washington Supreme Court's reliance on *McMillan v. Pennsylvania* is equally unavailing. *McMillan* – which this Court reaffirmed after *Apprendi* in *Harris v. United States*, 536 U.S. 545 (2002) – held that a factual finding necessary to impose a "mandatory minimum" sentence need not be submitted to a jury or proved beyond a reasonable doubt. Thus, as the Washington Supreme Court correctly noted, *Apprendi* does not apply to factual findings that merely dictate a certain sentence "within a range already available" to a sentencing court based on the elements of the offense of conviction. *Gore,* 143 Wn.2d 312 (quoting *McMillan*, 477 U.S. at 88).

But the exceptional-sentence system at issue here, unlike a situation involving a mandatory minimum, leads to sentences that are *not* already available to sentencing courts. Under Washington statutory law, at the moment a defendant pleads or is found guilty of a crime, the standard range is the only sentencing range that is legally available to a Washington court. Wash. Rev. Code §§ 9.94A.120(1) & (2). Imposing an exceptional sentence upward is not an option unless and until a court finds an aggravating fact not encompassed in the elements of the underlying crime. *Gore*, 143 Wn.2d at 315.

That being so, Washington's procedures for finding aggravating facts are covered by *Apprendi,* not *McMillan.* In *Apprendi* itself, in fact, this Court expressly "limit[ed] [*McMillan*'s] holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury verdict." 530 U.S. at 487 n.13. The aggravating facts at issue here – as in all exceptional sentences upward in Washington – allow the "imposition of a sentence more severe than the statutory

maximum for the offense established by the jury verdict." *Id.* They do not dictate any minimum sentence within an otherwise available range.

In fact, the Washington Supreme Court's *McMillan* rationale essentially repeats the same contention that the State of Arizona unsuccessfully advanced in *Ring* – namely, that a certain sentence is available to a sentencing court, regardless whether additional findings are necessary to impose it, so long as a provision of state law says that the sentence is a permissible punishment for the crime of conviction. But, as this Court explained in rejecting that argument: "The Arizona first-degree murder statute authorizes a maximum penalty of death only in the formal sense, . . . for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before the imposition of the death penalty." *Ring*, 536 U.S. at 604 (internal quotations and citation omitted). The necessity of finding such additional facts, not any cross-referencing in the statutory scheme, controls the constitutional analysis. *Id.*

Washington statutory law permitted a maximum sentence of 53 months for Petitioner's kidnapping offense, in the absence of aggravating facts not encompassed in his guilty plea. As such, the procedures for finding any such facts had to conform to the requirements of *Apprendi*. Washington law's "formal" permission to sentence Petitioner to more than 53 months *if aggravating facts were found* does not affect the result here.

II. The Exceptional Sentence Imposed Here Highlights the Practical and Structural Concerns Underlying *Apprendi*.

The *Apprendi* rule, of course, is more than a mechanical formula designed to separate criminal offense elements from other factual issues; it is the embodiment of "constitutional protections of surpassing importance." *Apprendi,* 530 U.S. at 476. Three aspects of the proceedings below demonstrate why it is vital that this Court hold firm to its insistence that any fact necessary to increase a defendant's sentences be alleged in advance and proven to a jury beyond a reasonable doubt.

First, the procedures that led to Petitioner's punishment underscore the need to require legislatures to treat every fact they deem essential to a given prison term with equal gravity. This Court explained in *Apprendi* that:

> New Jersey threatened Apprendi with certain pains if he unlawfully possessed a weapon and with additional pains if he selected his victims because of their race. As a matter of simple justice, it seems obvious that the procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment. Merely using the label "sentencing enhancement" to describe the latter surely does not provide a principled basis for treating them differently.

530 U.S. at 476.

Washington did not follow this elementary principle here. The Washington Legislature threatened Petitioner with certain pains if he kidnapped his wife; certain pains if he did so with a deadly weapon; and additional pains if he did so with

deliberate cruelty. But the Washington courts permitted the latter issue to be treated differently simply because the Legislature has designated it an "aggravating factor" instead of an element or sentencing enhancement. This reasoning allows the Legislature, through mere labeling, to mandate increases in defendants' sentences based on factual determinations that it has removed from the purview of the jury and that are not otherwise subject to the ordinary procedural protections governing statutory elements. In this case, in fact, Washington's system allowed the *largest* portion of Petitioner's sentence to turn on the factual finding that was subject to the *slightest* procedural protections: While the standard range for second degree kidnapping was 13-17 months, and the deadly weapon enhancement was 36 months, the deliberate-cruelty upward deviation that the trial court imposed was 37 months.

Legislatures, to be sure, have considerable discretion in defining crimes in the first instance – that is, in deciding which facts are essential to which kinds of punishment. But here, the Washington Legislature has decreed that the maximum sentence that it will permit for a defendant such as Petitioner committing the bare offense of second degree kidnapping with a deadly weapon is 53 months. Wash. Rev. Code §§ 9.94A.310(1) & (3)(b); *see also State v. Pascal,* 108 Wn.2d 125, 137, 736 P.2d 1065 (1987) ("The presumptive sentences established for each crime represent the *legislative judgment* as to how these interests [protection of the public, the need for rehabilitation, and the need to make frugal use of the state's resources] shall best be accommodated.") (emphasis added); *State v. Ammons,* 105 Wn.2d 175, 180, 713 P.2d 719 (1986) (Sentencing Reform Act allows courts sentencing discretion only within boundaries "given by the Legislature," which in the absence of aggravating or mitigating factors encompass only the standard range). The Legislature, in other words, has decided that it will not condone a sentence longer than 53

months in this context in the absence of an aggravating fact such as deliberate cruelty.

Apprendi holds that in such a situation – *i.e.,* when "a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others" – "it necessarily follows that the defendant should not – at the moment the State is put to the proof of those circumstances – be deprived of protections that have, until that point, unquestionably attached." 530 U.S. at 484. The Washington Legislature's exceptional sentence system unconstitutionally deprived Petitioner of these critical protections against an erroneous loss of liberty and an unwarranted additional stigma.[6]

Second, Petitioner's sentencing proceedings underscore the unfairness in allowing a judge to make a finding necessary to increase a defendant's punishment by only a preponderance of the evidence. The Sixth Amendment right of the accused to have a jury of his peers determine "the truth of every

---

[6] Because standard sentencing ranges in Washington, unlike those in the federal sentencing guidelines, are "prescribed by the legislature," *Apprendi,* 530 U.S. at 481, a decision invalidating Washington's procedures for imposing exceptional sentences upward would not necessarily nullify the comparable provisions in the United States Sentencing Guidelines. The federal sentencing grid is promulgated by a Sentencing Commission that resides in the Judicial Branch. Accordingly, as this Court noted in *Mistretta v. United States,* 488 U.S. 361 (1989), presumptive sentencing ranges under the federal guidelines are not legislative acts. Rather, they are "court rules" derived from "judicial rulemaking." *Id.* at 386 & 391. *Apprendi*'s prohibition against exceeding the "statutory" maximum based on facts that were not submitted to the jury or proved beyond a reasonable doubt arguably pertains only sentencing limits set by legislatures. *See Apprendi,* 530 U.S. at 523 n.11 (Thomas, J., concurring) (noting the "unique status" of the federal guidelines in light of *Mistretta*); *cf. supra* at 3 n.2 (noting other differences between Washington and federal guidelines).

accusation" is designed in part to guard against arbitrary, biased, or eccentric judicial decisions. *Duncan v. Louisiana,* 391 U.S. 145, 156 (1968) (quoting 4 William Blackstone, Commentaries on the Laws of England *349 (1768)). The Due Process Clause similarly requires the prosecution to prove each element of a criminal offense beyond a reasonable doubt because "the interests of the defendant are of such magnitude" that they must be protected by a standard of proof "designed to exclude as nearly as possible the likelihood of an erroneous judgment." *Addington v. Texas,* 441 U.S. 418, 423 (1979); *see also In re Winship,* 397 U.S. 358, 363-64 (1970) (beyond a reasonable doubt standard is "a prime instrument for reducing the risk of convictions resting on factual error"). As this Court noted in *Winship,* "a person accused of a crime . . . would be at a serious disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case." 397 U.S. at 363 (quotation and citation omitted); *see also People v. Reese,* 258 N.Y. 89, 101 (1932) (Cardozo, J.) ("The genius of our criminal law is violated when punishment is enhanced in the face of reasonable doubt as to the facts leading to the enhancement.")

But that is exactly what happened here. Petitioner was sentenced to more than three additional years in prison on the basis of a factual finding (deliberate cruelty) that the trial judge practically conceded was not proven beyond a reasonable doubt. The trial judge acknowledged that Petitioner's *mens rea* in committing his crimes presented a "complex" issue because his "personality disorders influence and direct . . . his behavior" and because, in kidnapping his wife, he "misguidedly intended to forcefully reunite his family" and to convince his wife "to terminate lawsuits and modify title ownerships to his benefit." J.A. 48 ¶¶ 29, 31. After an evidentiary hearing, in fact, the trial judge concluded only that "[d]efendant's personality disorders did not *significantly* impair

his capacity to act with deliberate cruelty." J.A. 49 ¶ 1 (emphasis added). Under these circumstances, a jury surely might have found reasonable doubt as to whether Petitioner acted with deliberate cruelty.

Third, this case implicates *Apprendi*'s core concern that someone accused of committing a crime have the "ability to predict with certainty the judgment from the face of the felony indictment" or the four corners of his guilty plea. *Apprendi,* 530 U.S. at 478. Under the facts alleged in Petitioner's information and thus encompassed in his guilty plea, the longest sentence that Washington law allows is 53 months. But the trial court, without even the State's backing, imposed a sentence 37 months longer than this statutory limit, based on additional facts that Petitioner hotly disputed. When Petitioner learned of the court's inclination to impose this increased sentence, he moved to withdraw his plea. But the trial court ruled against him. J.A. 8; Report of Proceedings 583-86.

"[T]he premise of *Apprendi* is that it is wrong to convict someone of one crime, and sentence [him] for another." David E. Rovella, *A Looming* Apprendi *Tsunami?,* Nat. LJ., Jan 8, 2001, at A1 (quoting Professor Erwin Chemerinsky). Yet that is essentially what the trial court did in this case. It accepted Petitioner's guilty plea to second degree kidnapping with a deadly weapon and then sentenced him for a more serious transgression: second degree kidnapping with a deadly weapon plus deliberate cruelty and domestic violence. Enforcing the *Apprendi* rule here will prevent defendants such as Petitioner from being blindsided by court-imposed sentences longer than they could have predicted from the facts charged in their indictments or acknowledged in their guilty pleas.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Washington Court of Appeals and hold that the procedures in Washington's Sentencing Reform Act for finding the aggravating facts necessary to impose exceptional sentences upward are unconstitutional.

Respectfully submitted,

JEFFREY L. FISHER
Counsel of Record
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150

December 4, 2003

Attorneys for Petitioner

(10)

No. 02-1632

Supreme Court, U.S
FILED
JAN 23 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

RALPH HOWARD BLAKELY, JR.,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

On Writ Of Certiorari
To The Washington Court Of Appeals
Division III

BRIEF FOR THE STATE OF WASHINGTON

JOHN D. KNODELL
Prosecuting Attorney
Counsel of Record
TERESA CHEN
Deputy Prosecuting Attorney
P.O. Box 37
Ephrata, Washington 98823
(509) 754-2011

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED (RESTATED)

Apprendi v. New Jersey, 530 U.S. 466 (2000) and *Ring v. Arizona,* 536 U.S. 584 (2002) hold that a criminal defendant is entitled to a jury determination and proof beyond reasonable doubt of enumerated facts necessary to increase the sentence for a crime beyond the statutory maximum sentence. Under Washington statutes, in the exercise of discretion, a trial court may depart from a standard range sentence and impose an exceptional sentence, not to exceed a statutorily designated maximum sentence, if the court articulates "substantial and compelling reasons justifying an exceptional sentence." WASH.REV.CODE § 9.94A.120(2). The trial court's discretion in this respect is guided but not limited by a nonexclusive, merely illustrative, list of factors. WASH.REV.CODE § 9.94A.390. Is such a sentencing decision subject to the rule of *Apprendi* and *Ring*?

TABLE OF CONTENTS

	Page
Question presented (restated)	i
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	1
Statement	1
A. Facts	1
B. Procedural History	3
C. Sentencing in Washington	6
Summary of Argument	9
Argument	10
I. There Is a Long History of Judicial Fact-finding for Sentencing Purposes "Within Limits Fixed by Law"	10
II. Sentencing Guidelines Which Structure Judicial Discretion Do Not Implicate the Jury Clause	12
III. The Washington Exceptional Sentence Statute Is Compatible with this Court's Precedents	14
A. Washington's Sentencing Guidelines Simply Add Guidance and Transparency to Discretionary Sentencing Decisions, and Are Distinctly Different from the Statutes Considered in *Apprendi* and *Ring*	17

TABLE OF CONTENTS – Continued

	Page
1. The Sentence Limits Provided in WASH. REV. CODE § 9A.20.021 Operate as True Statutory Maxima	19
2. The Standard Range Does Not Operate As the Statutory Maximum Penalty	21
3. The Washington Court's Interpretation of State Law is Authoritative	26
4. The Arizona Death Penalty Statute Is Not Properly Compared with the Washington Sentencing Guidelines	28
B. The Washington Courts' Construction of the SRA Is a Meaningful Interpretation of Legislative Intent That Does Not Manipulate the Definition of Criminal Acts to Avoid Constitutional Requirements, But Rather Identifies Traditional Non-exclusive Sentencing Factors to Guide Judicial Sentencing Discretion Within the Statutory Limits	29
IV. The Defendant Received Notice of the Maximum Penalty of Ten Years	34
V. There Are Significant Practical Problems with Expanding the *Apprendi* Rule as the Petitioner Proposes	36
Conclusion	41
Appendix	1a

TABLE OF AUTHORITIES

Page

CASES:

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 34

Apprendi v. New Jersey, 530 U.S. 466 (2000) ..... *passim*

Gustafson v. Alloyd Co., 513 U.S. 561 (1995) 28

Jones v. United States, 526 U.S. 227 (1999) 11, 15, 27, 30

Harris v. United States, 536 U.S. 545 (2002) ..... *passim*

Lockett v. Ohio, 438 U.S. 586 (1978) 10

McMillan v. Pennsylvania, 477 U.S. 79 (1986) 12, 15, 19

Mullaney v. Wilbur, 421 U.S. 684 (1975) 27, 30

Patterson v. New York, 432 U.S. 197 (1997) 29

Proffitt v. Florida, 428 U.S. 242 (1976) 11

Richardson v. United States, 468 U.S. 317 (1984) 40

Ring v. Arizona, 536 U.S. 584 (2002) ..... *passim*

State v. Allert, 117 Wash.2d 156, 815 P.2d 752 (1991) 23

State v. Ammons, 105 Wash.2d 175, 713 P.2d 719, 718 P.2d 796 (1986) 22

State v. Baldwin, 150 Wash.2d 448, 78 P.3d 1005 (2003) 18, 25

State v. Berry, 200 Wash. 495, 93 P.2d 782 (1939) 30

State v. Brooks, 107 Wash. App. 925, 29 P.3d 45 (2001) 20

State v. Cardenas, 129 Wash.2d 1, 914 P.2d 57 (1996) 8, 23, 24

State v. Gore, 143 Wash.2d 288, 21 P.3d 262 (2001) ... 6, 14, 19

TABLE OF AUTHORITIES – Continued

Page

State v. Gould, 23 P.3d 801 (Kan. 2001) 18

State v. Grewe, 117 Wash.2d 211, 813 P.2d 1238 (1991) 24

State v. Gunther, 45 Wash. App. 755, 727 P.2d 258 (1986) 8, 36, 38

State v. Harvey, 109 Wash. App. 157, 34 P.3d 850 (2001) 20

State v. Jacobson, 92 Wash. App. 958, 965 P.2d 1140 (1998) 23

State v. Oksoktaruk, 70 Wash. App. 768, 856 P.2d 1099 (1993) 23

State v. Owens, 95 Wash. App. 619, 976 P.2d 656 (1999) 14, 24

State v. Perez, 69 Wash. App. 133, 847 P.2d 532 (1993) 23, 24, 25

State v. Pryor, 115 Wash.2d 445, 799 P.2d 244 (1990) 25

State v. Weaver, 46 Wash. App. 35, 729 P.2d 64 (1986) 25

State v. Xaviar, 117 Wash. App. 196, 69 P.3d 901 (2003) 18, 28

United States v. Montalvo, 331 F.3d 1052 (9th Cir. 2003) 35

United States v. Tucker, 404 U.S. 443 (1975) 11

Walton v. Arizona, 497 U.S. 639 (1990) 26, 27

Williams v. New York, 337 U.S. 241 (1949) 10, 11

TABLE OF AUTHORITIES – Continued

Page

Winters v. New York, 335 U.S. 507 (1948).....27
Woodson v. North Carolina, 428 U.S. 280 (1976).....10

CONSTITUTION, STATUTES, AND RULES

ARIZ. REV. STAT. § 13-703 ..... 16, 21, 26, 27, 28
Fed. R. Evid. 404.....11
KAN. STAT. ANN. § 21-5401 (2003).....18
N.J. STAT. ANN. §§ 2C:39-4a.....16
N.J. STAT. ANN. § 2C:43-6 16
N.J. STAT. ANN. § 2C:44-3 16
18 U.S.C. § 924(c).....14
28 U.S.C. § 1257(a) 1
U.S. Const. amend. V.....1a
U.S. Const. amend. VI 1a
U.S. Const. amend. XIV.....1a
WASH. CRIM. R 3.2.1.....37
WASH. CRIM. R. 3.3.....38
WASH. REV. CODE § 9.68A.040 20
WASH. REV. CODE § 9.94A 6, 23
WASH. REV. CODE § 9.94A.010 .....7, 23
WASH. REV. CODE § 9.94A.100 .....7, 17
WASH. REV. CODE § 9.94A.120 .....*passim*
WASH. REV. CODE § 9.94A.125 8
WASH. REV. CODE § 9.94A.210 22

TABLE OF AUTHORITIES – Continued

Page

WASH. REV. CODE § 9.94A.310..... 7, 8, 20, 22, 31
WASH. REV. CODE § 9.94A.320..... 7
WASH. REV. CODE § 9.94A.360..... 7, 18
WASH. REV. CODE § 9.94A.370..... 4, 5, 6, 25, 34
WASH. REV. CODE § 9.94A.390..... 8, 22, 24, 31
WASH. REV. CODE § 9.94A.400..... 7
WASH. REV. CODE § 9.94A.420..... 18, 19, 20
WASH. REV. CODE § 9A.20.021..... *passim*
WASH. REV. CODE § 9A.40.020..... 30
WASH. REV. CODE § 9A.40.030..... 7, 16, 30, 35
WASH. REV. CODE § 9A.40.040..... 31
WASH. REV. CODE § 9A.40.060..... 31
WASH. REV. CODE § 10.95 28

SECONDARY SOURCES

Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L. J. 1097 (2001)..... 11, 35

David Boerner & Roxanne Lieb, *Sentencing Reform in the Other Washington*, 28 CRIME & JUST. 71 (2001)..... 24, 33, 36

TABLE OF AUTHORITIES – Continued

Page

B. Patrick Costello, *Apprendi v. New Jersey: "Who Decides What Constitutes a Crime?" An Analysis of Whether a Legislature is Constitutionally Free to "Allocate" an Element of an Offense to an Affirmative Defense or a Sentencing Factor Without Judicial Review*, 77 NOTRE DAME L. REV. 1205 (2002) 36, 37

Jane A. Dall, *A Question for Another Day: The Constitutionality of the U.S. Sentencing Guidelines Under Apprendi v. New Jersey*, 78 NOTRE DAME L. REV. 1617 (2003) 12, 33, 34, 35, 40

Seth A. Fine & Douglas J. Ende, *Washington Practice* Vol. 13A (2d ed.1998) 31

Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467 (2001) 11

Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883 (1990) 32

Benjamin J. Priester, *Sentenced for a "Crime" the Government Did Not Prove: Jones v. United States and the Constitutional Limitations on Factfinding by Sentencing Factors Rather than Elements of the Offense*, 61 LAW & CONTEMP. PROBS. 249 (1998) 35

Washington Courts, *Superior Court Annual Caseload Report 2002* (visited January 14, 2004) <http://www.courts.wa.gov/caseload/superior/ann/atbl02.pdf> 39, 40

TABLE OF AUTHORITIES – Continued

Page

11 *Washington Pattern Jury Instructions: Criminal*, (2d ed. 1994) 28

State of Washington Sentencing Guidelines Commission, *Statistical Summary of Adult Felony Sentencing – Fiscal Year 2002* (2003) (visited January 14, 2004) <http://www.sgc.wa.gov/Stat%20Report%202002.pdf> 39

OPINIONS BELOW

The opinion of the Washington Court of Appeals is reported at 111 Wash. App. 851, 47 P.2d 149 (2002) and is reprinted at J.A. 2-23. The order of the Washington Supreme Court denying discretionary review of that decision is reported at148 Wash.2d 1010, 62 P.3d 889 (2003) and is reprinted at J.A. 60. The trial court's sentence and findings are reproduced at J.A. 24-50. The transcript of the trial court's ruling on the question presented is reprinted at J.A. 51-59.

JURISDICTION

The judgment of the Washington Supreme Court denying review issued on February 4, 2003. J.A. 60. The petition for a writ of certiorari was filed on May 5, 2003, and was granted on October 20, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in an appendix to this brief. App, *infra*, 1a-16a.

STATEMENT

A. FACTS

On October 26, 1998, the Petitioner Howard Ralph Blakely accosted his estranged wife Yolanda Blakely at her

orchard home in Grant County, Washington in violation of a restraining order. J.A. 40-41 ¶2-4. He grabbed her by her wrists and arms, twisting them and bringing her to the ground. J.A. 41 ¶5-6. He knelt on her ribs and he wrapped her head with duct tape and tied her hands tightly. J.A. 41 ¶6. Mr. Blakely carried and walked his wife through the orchard demanding she dismiss the pending dissolution and trust litigation she had instituted against him. J.A. 41-42 ¶7. He warned her that he could get away with murder. J.A. 42 ¶7. Reciting the knives, guns, and ammunition in his possession, Mr. Blakely threatened to kill his wife and himself. J.A. 42 ¶8. Holding a knife to her, Mr. Blakely forced his wife to climb over the tailgate of his pickup, under the canopy, and into a homemade coffin, which he then latched shut. J.A. 42 ¶9. The coffin's length was only three inches longer than Mrs. Blakely's standing height. J.A. 42 ¶9. Pressing a knife to her throat or nostrils and telling her she would bleed to death, Mr. Blakely compelled his wife to reveal the location of various property and documents which he loaded into the truck. J.A. 42-43 ¶10.

When their thirteen year old son Ralphy arrived home from school, Mr. Blakely emerged from behind a tree with a knife and threatened to kill Yolanda and Ralphy if the boy did not obey. J.A. 43 ¶11. Ralphy approached the pickup and heard his mother yelling, kicking, and pleading. J.A. 43 ¶12. While using the restroom, Ralphy looked for a gun to rescue his mother, but could not find one. J.A. 43 ¶13. Mr. Blakely ordered his young son to follow the pickup in his mother's car and threatened to kill Yolanda by blowing a hole through the coffin with a shotgun if Ralphy "tried anything." J.A. 43 ¶13. The thirteen year old escaped at a gas station, but Mr. Blakely proceeded to

Montana with his wife, driving back roads through the night. J.A. 44-45 ¶15-20. Mrs. Blakely was cold, cramped, hungry, and bound throughout the ordeal, unable to remove her clothes to relieve herself. J.A. 45-46 ¶11, 19, 21.

Once they arrived in Montana, Mr. Blakely hid from police at his neighbor Mary Gillespie's house. J.A. 46 ¶23. There he demanded his wife sign over her property and litigation rights, and he engaged in business over the phone with his stockbroker. J.A. 46-47 ¶24. He made frequent phone calls to his live-in girlfriend of two and a half years, Ilse Barros. J.A. 46 ¶24. Eventually Ms. Gillespie escaped the house and alerted police. J.A. 4 ¶4, 47 ¶24. Federal agents arrested Mr. Blakely on October 27, 1998. J.A. 4-5, 47 ¶25.

B. PROCEDURAL HISTORY

On October 27, 1998, the Defendant was charged with the first degree kidnappings of his wife Yolanda Blakely and their 13 year old son Ralphy Blakely. J.A. 1, CP (Clerk's Papers) 1-6. After multiple mental health evaluations, Mr. Blakely requested a jury trial on competency and was found competent to stand trial. J.A. 5-6. Evaluators concluded that Mr. Blakely had high average intelligence, had never been a paranoid schizophrenic, and sought psychiatric treatment only as a means of avoiding legal responsibility. J.A. 5.

On July 18, 2000, Mr. Blakely pleaded guilty to one count of second degree domestic violence kidnapping of his wife with a deadly weapon enhancement and one count of second degree domestic violence assault of his son. J.A.

61-74. The plea reduced the charges from class A felonies to class B felonies.

The charging information was amended for the plea. It informed the Defendant of the maximum penalty of 10 years imprisonment. J.A. 76. The plea statement informed the Defendant yet again of the maximum penalty. J.A. 63. The plea statement informed the Defendant that, notwithstanding the prosecutor's recommendation, the judge might sentence outside of the standard range for substantial and compelling reasons. J.A. 66. The judge repeated this orally. VRP (Verbatim Report of Proceedings) 549-50 ("[D]o you understand that even though that would be the standard range, that the judge could sentence you above the standard range if the judge found compelling reasons to do that?").

At sentencing, the court heard from witnesses under oath and subject to cross-examination. J.A. 8. The court imposed an exceptional sentence of 90 months on the kidnapping conviction to run concurrently with a 14 month sentence on the assault charge. J.A. 8. The court considered the purposes of the Sentencing Reform Act and the uncontested[1] facts that the kidnapping involved "repeatedly and protractedly confining the victim in a

[1] Under the statute, a defendant acknowledges facts introduced at a sentencing hearing by failing to object. WASH. REV. CODE § 9.94A.370(2). While the Defendant objected to the imposition of an exceptional sentence, he did not object to the findings of fact that his thirteen year old son was present during the commission of the crime, nor did he object to the finding of fact that he handcrafted a coffin-shaped box to the measurements of his wife and forced her inside it. J.A. 12 ¶3.

coffin-like box" manifesting deliberate cruelty and intimidation of the kidnapping victim and the minor child observing the acts. J.A. 49. The court found that there were substantial and compelling reasons to depart from the standard range and impose the just and deserved punishment of a 90 month sentence. J.A. 49. The trial judge did not find the defense counsel's reunion explanation mitigated the offense. VRP 1051-53. " . . . Mr. Blakely was not trying as a principal goal to reunite his family . . . His first overtures were you've got to terminate the trust litigation." VRP 1052-53. In the course of the kidnapping, Mr. Blakely stole financial files from his wife's home and concealed them at Ms. Gillespie's house, where they were only discovered months later. VRP 688.

The Petitioner made a motion for a standard range sentence, objecting to the sentence as a violation of the holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The court denied the motion, holding that the requirements of *Apprendi* "do not apply to a case in which the court proposes to sentence the defendant within the maximum standard range, in this case 10 years, adopted by the legislature and proscribed as the appropriate level of punishment for this offense." J.A. 58.

On appeal, Mr. Blakely objected to the exceptional sentence as a violation of the Real Facts Doctrine under WASH. REV. CODE § 9.94A.370(2)[2] and a violation of *Apprendi*. J.A. 15.

[2] As the Petitioner acknowledges, recodifications and amendments in the SRA have not altered the substantive law relevant to this case.

(Continued on following page)

The Real Facts Doctrine precludes a sentencing court from using "facts that establish a more serious crime or additional crimes as the basis for a sentence outside the presumptive range." J.A. 16; WASH. REV. CODE § 9.94A.370(2). Thus, the state cannot use aggravating factors to circumvent charging and proving aggravated crimes. The Court of Appeals found that no aggravating factor violated the Real Facts Doctrine and held that the domestic violence factors (i.e., the cruelty toward the child witness of his mother's kidnapping) clearly were permitted under the doctrine and standing alone supported the exceptional sentence. J.A. 16-18.

Following *State v. Gore*, 143 Wash.2d 288, 21 P.3d 262 (2001), the Court of Appeals held that the *Apprendi* rule is not triggered, because aggravating factors in an exceptional sentence "neither increase the maximum sentence nor define separate offenses calling for separate penalties." J.A. 19.

The Washington Supreme Court denied review. J.A. 60.

The Petitioner has requested this Court's review.

C. SENTENCING IN WASHINGTON STATE.

The Sentencing Reform Act (SRA) of Washington State, codified at WASH. REV. CODE § 9.94A, is a determinate sentencing system which "structures, but does not eliminate, discretionary decisions affecting sentences . . . "

For consistency's sake, this brief refers to the old statutory section numbers in effect for Mr. Blakely's sentence.

WASH. REV. CODE § 9.94A.010. It channels judicial discretion, permitting sentencing within the limits of law (statutory maxima set out in the chapter on substantive crimes at WASH. REV. CODE § 9A.20.021) and granting absolute discretion within more narrow ranges. WASH. REV. CODE § 9.94A.120.

Sentences for two or more current offenses are served concurrently. WASH. REV. CODE § 9.94A.400(1)(a). The more serious of Mr. Blakely's crimes was the kidnapping. J.A. 27. The statutory maximum for the crime of second degree kidnapping is ten years imprisonment. WASH. REV. CODE § 9A.20.021(1)(b); WASH. REV. CODE § 9A.40.030(3).

The seriousness level of second degree kidnapping is a V. WASH. REV. CODE § 9.94A.360; J.A. 27. At sentencing, Mr. Blakely's offender score was determined to be a II.[3] WASH. REV. CODE §§ 9.94A.100 & 9.94A.320; J.A. 27. The standard range for a crime of seriousness level V with an offender score of II is 13-17 months. WASH. REV. CODE § 9.94A.310; J.A. 27.

Mr. Blakely pleaded guilty to a firearm enhancement, which added a mandatory term of 36 months to his

---

[3] Note J.A. 64. Mr. Blakely's prior convictions "washed out" and were not factored into his offender score. For example, the prior kidnapping conviction of 1969 washes because there was no known subsequent conviction in the ten years immediately following. His offender score of II is the result of the "present" conviction on violent offenses. WASH. REV. CODE § 9.94A.360(8).

sentence. J.A. 25.[4] The effect of the enhancement was to raise his standard range to 49-53 months. J.A. 27.

The court in its discretion may sentence outside the standard range if it finds, considering the purposes of the SRA, that there are substantial and compelling reasons justifying a different punishment. WASH. REV. CODE § 9.94A.120(2). The statute invites sentencing courts to consider an illustrative list of circumstances that may mitigate or aggravate the offense. WASH. REV. CODE § 9.94A.390. Courts decide as a matter of law if the particular offense is more egregious or more onerous than typical. *State v. Cardenas*, 129 Wash.2d 1, 5-6, 914 P.2d 57, 59 (1996).

The sentencing court in Mr. Blakely's case determined that circumstances (the Defendant's deliberate cruelty manifested toward the victim in confining her in a coffin-like box and his deliberate cruelty toward or intimidation of his minor son who helplessly witnessed his mother's kidnapping) provided substantial and compelling reasons to depart from the range. This determination of substantial and compelling reasons enabled the court to impose a sentence of ten years. The court imposed a sentence of seven and a half years.

[4] In Washington state, the term "enhancement" refers to findings that result in specific, mandatory penalties. Enhancements are treated as elements, requiring they be pleaded in the charging information and proven beyond reasonable doubt. WASH. REV. CODE § 9.94A.125; *State v. Gunther*, 45 Wash. App. 755, 727 P.2d 258 (1986), *review denied*, 108 Wn.2d 1013 (1987). They may not result in sentences beyond the statutory maximum. WASH. REV. CODE § 9.94A.310(4)(g).

On review, the Court of Appeals determined that the exceptional sentence did not violate the Real Facts Doctrine by punishing Mr. Blakely for an aggravated crime and that the finding of substantial and compelling reasons was not an abuse of discretion.

SUMMARY OF ARGUMENT

Judges may find facts that raise sentencing guidelines, so long as those facts do not raise the statutory maximum sentence. Washington law follows the most recent precedents permitting judicial fact-finding within the limits fixed by law. *Ring v. Arizona*, 536 U.S. 584 (2002); *Harris v. United States*, 536 U.S. 545 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Aggravating facts do not raise the statutory maximum sentence set out in WASH. REV. CODE § 9A.20.021 and as interpreted by Washington courts. Therefore, there is no requirement that these facts be found by a jury beyond reasonable doubt.

The visibility requirement for exceptional sentences (courts must articulate their reasons) does not alter in label or by operation the statutory maximum that is authorized by a guilty verdict. A defendant can have no liberty interest in a narrow sentencing range which is not established at the time of plea. Mr. Blakely had notice, a significant rationale of the *Apprendi* rule, of his maximum penalty before pleading guilty. Extending the *Apprendi* rule as the Petitioner proposes is unworkable as circumstances relevant in individualized sentencing are limitless and the resulting jury trials would be administratively prohibitive.

ARGUMENT

I. There Is a Long History of Judicial Fact-finding for Sentencing Purposes "Within Limits Fixed by Law."

Individualized sentencing is constitutionally required in capital cases and statutorily required in noncapital cases. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense" in determining the sentence); *Lockett v. Ohio*, 438 U.S. 586, 602-05 (1978) (throughout the country, public policy as reflected in statutes establishes the practice of individualized sentences).

At sentencing, the fullest information concerning the crime and the defendant's life and characteristics is relevant. *Williams v. New York*, 337 U.S. 241, 246 (1949). The court seeks to tailor the type and extent of punishment to the individual defendant, because punishment should fit the offender and not merely the offense. *Id. See also Lockett*, 438 U.S. at 602. The definition of crimes does not automatically dictate the punishment, and where the legislature grants courts discretion at sentencing, the court's "possession of the fullest information possible concerning the defendant's life and characteristics is highly relevant – if not essential – to the selection of an appropriate sentence." *Lockett*, 438 U.S. at 602-03 (citing *Williams*, 337 U.S. at 247).

There are historical bases as well as practical reasons for examining elements and sentencing factors under different evidentiary rules. *Williams*, 337 U.S. at 246. A

court imposes a sentence only after "the narrow issue of guilt" has already been determined. *Williams*, 337 U.S. at 247. *Id.* Under the rules of evidence, the trier of fact during the guilt phase is prevented from hearing prejudicial information that will be relevant later for sentencing purposes. Fed. R. Evid. 404. However, there is no justification for keeping the best available information from the sentencing judge. *Williams*, 337 U.S. at 250-51.

The Constitution does not require a jury to determine every fact relevant in sentencing. *Harris*, 536 U.S. at 549 ("not all facts affecting the defendant's punishment are elements"); *Jones v. United States*, 526 U.S. 227, 248 (1999) ("It is not, of course, that anyone today would claim that every fact with a bearing on sentencing must be found by a jury; we have resolved that general issue and have no intention of questioning its resolution."); *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) ("[The Court] has never suggested that jury sentencing is constitutionally required.")

The Jury Clause has long coexisted with broad judicial discretion at sentencing within the statutory limits. *Apprendi*, 530 U.S. at 481; *United States v. Tucker*, 404 U.S. 443, 447 (1975) (sentences "within statutory limits" are not subject to collateral attack); *Williams*, 337 U.S. at 246 (there is a long history of judicial fact-finding "within limits fixed by law"); Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L. J. 1097, 1125-228 (2001); Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1506 (2001).

In *Apprendi*, this Court explicitly preserved this status – stating the rule that facts must be submitted to a

jury only when their finding increases the penalty "beyond the prescribed statutory maximum." *Apprendi*, 530 U.S. at 490. So long as the sentence does not exceed the statutory maximum, "facts guiding judicial discretion . . . need not be alleged in the indictment, submitted to a jury, or proved beyond a reasonable doubt . . . . even if those facts are specified by the legislature and even if they persuade the judge to choose a much higher sentence than he or she would otherwise have imposed." *Harris*, 536 U.S. at 565-66.

Here, the sentence is within the limits fixed by the legislature's unalterable statutory maximum sentence of ten years, a meaningful limit for a class B felony. Thus the legislature's rules suffice to check and constrain judicial discretion.

II. Sentencing Guidelines Which Structure Judicial Discretion Do Not Implicate the Jury Clause.

This Court has held that legislation that structures judges' sentencing decisions does not create a constitutional issue. *McMillan v. Pennsylvania*, 477 U.S. 79, 92 (1986) ("We have some difficulty fathoming why the due process calculus would change simply because the legislature has seen fit to provide sentencing courts with additional guidance.") "Within the range authorized by the jury's verdict, [ ] the political system may channel judicial discretion" without implicating the jury requirement of *Apprendi*. *Harris*, 536 U.S. at 567. *See also* Jane A. Dall, *A Question for Another Day: The Constitutionality of the U.S. Sentencing Guidelines Under Apprendi v. New Jersey*, 78 NOTRE DAME L. REV. 1617, 1673 (2003) ("What was constitutional before the Sentencing Guidelines cannot be

unconstitutional after the Sentencing Guidelines."); B. Patrick Costello, *Apprendi v. New Jersey: "Who Decides What Constitutes a Crime?" An Analysis of Whether a Legislature is Constitutionally Free to "Allocate" an Element of an Offense to an Affirmative Defense or a Sentencing Factor Without Judicial Review*, 77 NOTRE DAME L. REV. 1205, 1250 (2002) ("A compelling purpose of the [Jury Clause] is to protect criminal defendants against potentially arbitrary judges. . . . if [jury trial guarantees] apply to sentencing at all, [it is logical to conclude they] would apply with greater strength to discretionary-sentencing schemes rather than to determinate-sentencing schemes.")

This Court emphasized that "[i]t is critical not to abandon that understanding at this late date [because] legislatures and their constituents have relied upon *McMillan*." *Harris*, 536 U.S. at 567. Indeed, the Washington Supreme Court articulated its reliance upon *McMillan* in deciding the Petitioner's question. *State v. Gore*, 143 Wash.2d 288, 312-14 (2001), *citing McMillan*, 477 U.S. at 92 ("we have consistently approved sentencing schemes that mandate consideration of facts relating to the crime . . . without suggesting that those facts be proved beyond a reasonable doubt").

Washington courts have followed this precedent, holding there is no constitutional right to a standard range sentence, i.e., a stricter (or "less discretionary") application of the guidelines than directed by the statute. *State v. Owens*, 95 Wash. App. 619, 628-29 & n.17, 976 P.2d 656, 661 & n.17 (1999) (citing various federal cases). Washington courts interpret that the guidelines "do not specify that a particular sentence must be imposed," but "are intended only to structure discretionary decisions affecting sentences." *Id.* The SRA "does not establish the illegality of

any conduct. Rather, it provides directives to judges and not to citizens." *State v. Owens*, 95 Wash. App. at 629 n.17, 976 P.2d at 661 n.17. Sentencing guidelines like Washington's standard ranges are designed to structure judicial discretion and to require transparency in sentencing. They are not designed to remove elements from a jury's consideration.

Because the structured discretion of determinate systems does not result in sentences above the statutory maximum, the *Apprendi* jury rule is not implicated. *Gore*, 143 Wash.2d at 314, 21 P.3d at 277 ("Aggravating factors neither increase the maximum sentence nor define a separate offense calling for a separate penalty.")

III. The Washington Exceptional Sentence Statute Is Compatible with this Court's Precedents.

The Washington SRA is consistent with this Court's recent exposition of the narrow rule of *Apprendi*. The *Harris* case is most directly on point, precluding the Petitioner's argument that *Apprendi* extends to sentences within statutory limits.

In *Harris*, the defendant was found guilty at a bench trial of a firearms charge under 18 U.S.C. § 924(c)(1)(A). *Harris*, 536 U.S. at 551. The trial court determined by a preponderance of the evidence that the defendant had brandished the weapon. *Id.* The effect of this finding raised the presumptive sentence under the federal sentencing guidelines from five to seven years. Although the court's finding altered the defendant's range of punishment, it did not raise the sentence above the implied maximum of life imprisonment. This Court held that "not

all facts affecting the defendant's punishment are elements" and affirmed the sentence. *Harris*, 536 U.S. at 549.

The rationale in *Harris* emphasized that the *Apprendi* rule only applied to sentences that exceeded statutory limits. Once a verdict has been reached, "the barriers between government and defendant fall. The judge may select any sentence within the range, based on facts not alleged in the indictment or proved to the jury – even if those facts are specified by the legislature, and even if they persuade the judge to choose a much higher sentence than he or she otherwise would have imposed. That a fact affects the defendant's sentence, even dramatically so, does not by itself make it an element." *Harris*, 536 U.S. at 566. The holding was consistent with *McMillan*, which *Apprendi* and *Jones* had upheld.

The Court in *Harris* refused to extend the *Apprendi* rule to statutory minima. This forecloses the Petitioner's argument that the Court should extend *Apprendi* to cover guideline maxima as well as statutory maxima. Because the Washington statutory maximum penalty of ten years for Mr. Blakely's crimes is not implied but clear on the face of the statute and court documents, there is even greater reason to uphold the SRA.

The Washington guidelines are distinctly different from the statutes considered in *Apprendi* and *Ring*. *Apprendi* and *Ring* concerned statutes authorizing punishment in addition to that within the court's discretion on conviction and only on proof of one or more specific, enumerated facts. Under the Washington guidelines, an exceptional sentence is within the court's discretion as a result of a guilty verdict. While the statute invites the court to consider various non-exclusive circumstances, no

specific facts need be found for the court to impose an exceptional sentence within statutory limits.

In *Apprendi*, the defendant pleaded guilty to crimes which carried penalties of five to ten years. *Apprendi*, 530 U.S. at 469-70; N.J. STAT. ANN. §§ 2C:39-4a & 2C:43-6(a)(2). A separate statute increased the penalties to twenty and thirty years with a finding of a biased purpose. N.J. STAT. ANN. § 2C:44-3(e). By a preponderance of the evidence, the sentencing judge found a racial motive and sentenced the defendant to a term of twelve years. *Apprendi*, 530 U.S at 471. The Court found that if the defendant had been sentenced based on the verdict alone, his maximum penalty would have been ten years. *Apprendi*, 530 U.S at 483. The twelve year sentence exceeded the statutory maximum.

Mr. Blakely, on the other hand, pleaded guilty to a second degree kidnapping, the statutory maximum penalty for which is ten years. WASH. REV. CODE §§ 9A.20.021 & 9A.40.030. Mr. Blakely's sentence of seven and a half years does not exceed the statutory maximum.

In *Ring*, a death penalty case, the Court noted that under the Arizona court's interpretation of ARIZ. REV. STAT. § 13-703, the statutory maximum penalty authorized by a jury verdict for a first degree felony murder was life imprisonment. The Arizona court explained that the death penalty could only be imposed if at least one out of ten enumerated facts was found. Pursuant to the state court's interpretation, these facts operated as elements of the crime, raising the penalty above that authorized by a jury verdict alone.

In contrast, Washington courts have not interpreted the standard ranges to be the operational maxima authorized by a jury verdict. The statutory maximum in WASH. REV. CODE § 9A.20.021 is the maximum by effect as well as label. Where the range exceeds the statutory maximum, it may not be imposed. Unlike the Arizona death penalty statute, the SRA does not enumerate a finite list of factors that mandate an elevation in the penalty. No specific fact need be found for the court to depart from the standard range.

A. Washington's Sentencing Guidelines Simply Add Guidance and Transparency to Discretionary Sentencing Decisions, and Are Distinctly Different from the Statutes Considered in *Apprendi* and *Ring*.

The critical question raised by the Petitioner is: What is the statutory maximum sentence authorized by Mr. Blakely's plea to a second degree domestic violence kidnapping with weapons enhancement?

The Petitioner argues that the maximum sentence authorized is 53 months imprisonment. This number is the upper end of the standard range for a crime of seriousness level V and offender score II plus a 36 month weapons enhancement. J.A. 27.

The Petitioner's number is the result of a complicated equation with variables yet undetermined at the time of Mr. Blakely's decision to plead guilty. At the time of Mr. Blakely's plea, the offender score on the plea statement represented only the prosecutor's early prediction. WASH. REV. CODE § 9.94A.100 (establishing that the offender score is determined at sentencing hearing, not at the plea

hearing). The offender score is a battleground of issues between the attorneys to be decided subsequent to a verdict (e.g., Can the prior conviction be proven? Is it valid? Has it been vacated? Does it wash out? Was it served concurrently with another offense? Do the current convictions encompass the same criminal conduct?). Former WASH. REV. CODE § 9.94A.360. A defendant can have no liberty interest in a range which results from an offender score that is not yet adjudicated. *State v. Baldwin*, 150 Wash.2d 448, 78 P.3d 1005, 1012 (2003) (en banc) (unanimous decision holding that the guidelines do not create a constitutionally protectable liberty interest). *See also State v. Xaviar*, 117 Wash. App. 196, 205-06, 69 P.3d 901, 906-07 (2003) (the standard range is not a presumptive maximum sentence that accompanies the jury's verdict).[5]

Washington statute and case law determine the statutory maximum, and the language is unequivocal. WASH. REV. CODE § 9A.20.021 (the maximum punishment for a class B felony is ten years); WASH. REV. CODE § 9.94A.120(13) (the statutory maximum is that provided in WASH. REV. CODE § 9A.20); WASH. REV. CODE § 9.94A.420 (when the sentencing range conflicts with the statutory maximum by exceeding it, the statutory maximum rule shall prevail); *State v. Baldwin*, 150 Wash.2d 448, 78 P.3d 1005 (2003) (laws granting significant degrees of

[5] Petitioner's citation to a Kansas holding is incongruous (Brief for Petitioner at 17, citing *State v. Gould*, 23 P.3d 801 (Kan. 2001)), because Kansas indeed has no statutory maximum other than the standard grid or, with a jury finding of an aggravating factor, a multiple thereof. KAN. STAT. ANN. § 21-5401 (2003). There is no comparison with the Washington SRA. Kansas defendants do not have notice of a definitive sentence range, because the applicable grid is undetermined at the time of plea.

discretion, like the SRA, do not create a protectable liberty interest); *State v. Gore*, 143 Wash.2d 288, 21 P.3d 262 (2001) (aggravating factors neither increase the maximum sentence set in WASH. REV. CODE § 9A.20 nor define a separate offense calling for a separate penalty). The maximum sentence permitted for the instant crime as determined by statute and case law is ten years imprisonment.

The Petitioner argues that the Washington court's construction of the plain language of the SRA is mere "characterization" and that the standard ranges operate as maxima. Under the precedents of *Apprendi* and *Ring* the courts consider effect over form as construed by the state court, not by the Petitioner. The Washington courts' construction of the clear statutory language demonstrates that the effective or operative maximum penalty for a class B felony is ten years. Because this is so, this Court's precedent in *Harris* and *McMillan* apply and preclude the Petitioner's claim.

1. The Sentence Limits Provided in WASH. REV. CODE § 9A.20.021 Operate as True Statutory Maxima.

Courts consistently apply the statutory maxima in WASH. REV. CODE § 9A.20.021 in tandem with the SRA. *See* WASH. REV. CODE §§ 9.94A.120(13) & 9.94A.420 (contrasting standard ranges with the statutory maximum in WASH. REV. CODE § 9A.20). This limit benefits defendants by restricting standard ranges.

In theory, it is possible for the standard range to exceed the statutory maximum. Accordingly, the statute establishes a hierarchy. When the range in the grid at

WASH. REV. CODE § 9.94A.310 exceeds the statutory maximum in WASH. REV. CODE § 9A.20.021, the statutory maximum and not the grid shall be the presumptive range. WASH. REV. CODE §§ 9.94A.120(13) & 9.94A.420. When the sentence (standard range or exceptional) plus any mandatory enhancement exceed the maximum, the statutory maximum caps the sentence imposed. WASH. REV. CODE § 9.94A.310(4)(g); *State v. Harvey*, 109 Wash. App. 157, 34 P.3d 850 (2001), *overruled on other grounds by State v. Thomas*, – Wash.2d –, 80 P.3d 168 (2003) (the sum of the base sentence plus mandatory enhancement may not exceed the statutory maximum).

The hierarchy favors defendants, providing an absolute cap and trustworthy notice of the maximum penalty. For example, a defendant with a 9+ offender score who is convicted of a class B felony with seriousness level IX (e.g. sexual exploitation under WASH. REV. CODE § 9.68A.040) has a standard range of 129-171 months, which is in excess of the 10 year (120 month) maximum under WASH. REV. CODE § 9A.20.021(1)(b). In this situation, the courts may ***not*** sentence the defendant to a standard range sentence, but rather must sentence below the cap of 120 months, significantly reducing the sentence.

The maximum in WASH. REV. CODE § 9A.20.021 may also alter the standard range in special rehabilitative sentencing alternatives. Under a drug treatment alternative (DOSA), the court imposes half a standard range sentence. The sentence is calculated by halving the midpoint of the standard range. When the standard range exceeds the maximum, it is capped by the maximum, effectively reducing the sentence. *State v. Brooks*, 107 Wash. App. 925, 29 P.3d 45 (2001) (where the standard

range was 47.25 to 63 months, and the statutory maximum was five years, the DOSA sentence was calculated by halving the midpoint of 47.25-60).

The Petitioner's proposed extension of the *Apprendi* rule, undercutting a clearly defined maximum, does not benefit defendants.

2. The Standard Range Does Not Operate As the Statutory Maximum Penalty.

Under Washington law, a sentencing judge need not find any particular fact to impose a sentence outside the standard range; the judge need only articulate a reason for the departure. This is a crucial difference from the Arizona statute in *Ring*.

The Arizona statute contains significantly different language, mandatory language that is notably absent from the Washington statute. Compare ARIZ. REV. STAT. § 13-703 ("[i]n determining whether to impose a sentence of death or life imprisonment, the trier of fact *shall* take into account the aggravating and mitigating circumstances that have been proven. The trier of fact *shall* impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency. The trier of fact *shall* consider the following aggravating circumstances in determining whether to impose a sentence of death" (emphasis added)), with WASH. REV. CODE § 9.94A.120 ("The court *may* impose a sentence outside the standard sentence range for that offense if it finds, considering the purposes of this chapter,

that there are substantial and compelling reasons justifying an exceptional sentence." (emphasis added)) and with WASH. REV. CODE § 9.94A.390 ("[i]f the sentencing court finds that an exceptional sentence outside the standard range should be imposed in accordance with RCW 9.94A.120(2), the sentence is subject to review only as provided for in RCW 9.94A.210(4). The following are illustrative factors which the court *may* consider in the *exercise of its discretion* to impose an exceptional sentence. The following are *illustrative only* and are *not intended to be exclusive reasons* for exceptional sentences." (emphasis added)).

The decisions of the Washington courts confirm that as a matter of state law, the standard ranges do not limit judicial discretion in a manner that implicates due process or the right to a jury determination. Washington's sentencing guidelines simply add guidance and transparency to discretionary sentencing decisions. The guidelines identify traditional non-exclusive and non-binary sentencing factors to guide judicial discretion within a statutory maximum sentence. They further require the courts to set forth in writing the reasons for imposing a sentence beyond the presumptive range to insure that the sentence is based upon the evidence, is not based upon the court's conclusion that a more serious crime has been committed, and is reviewable by a higher court.

In a plain reading of the statute, the Washington Supreme Court has long held that WASH. REV. CODE § 9.94A.310 merely channels or structures discretion, and that WASH. REV. CODE § 9A.20.021 is the operative maximum. *State v. Ammons*, 105 Wash.2d 175, 181, 713 P.2d 719, 723, 713 P.2d 719, 718 P.2d 796, *cert. denied*, 479 U.S. 930 (1986). This is clear from the very beginning of the

statute. In its purpose section, the legislature declares that the system in WASH. REV. CODE § 9.94A "structures but does not eliminate discretionary decisions affecting sentences." WASH. REV. CODE § 9.94A.010. Sentencing discretion is "structured" such that courts have unfettered discretion within the narrow standard range, and less than absolute discretion outside the range. *Id*. The Washington SRA channels judicial discretion toward standard ranges, but does not mandate that sentences be within the range. If a court departs from the range, for the sake of transparency and appellate review, the statute requires a written explanation. The procedural safeguard prevents arbitrary sentencing decisions. *State v. Jacobson*, 92 Wash. App. 958, 968, 965 P.2d 1140, 1145 (1998).

The statute reads and the courts have frequently explained that in order to justify an exceptional sentence, a court must delineate the *substantial and compelling reasons* consistent with the purposes of the SRA which justify a nonstandard sentence. WASH. REV. CODE § 9.94A.120(2); *State v. Cardenas*, 129 Wash.2d 1, 914 P.2d 57 (1996) (reversing an exceptional sentence, holding that the fact of the victim's multiple injuries and the defendant's reckless driving in a residential neighborhood were not substantial and compelling reasons to depart from the standard range for convictions of vehicular assault and hit and run convictions); *State v. Allert*, 117 Wash.2d 156, 164, 169, 815 P.2d 752, 756, 759 (1991); *State v. Oksoktaruk*, 70 Wash. App. 768, 771, 856 P.2d 1099, 1101 (1993); *State v. Perez*, 69 Wash. App. 133, 137, 847 P.2d 532, 535, *review denied* 122 Wash.2d 1015 (1993). Reasons are not facts, but justifications as a matter of law. The non-exhaustive list of mitigating and aggravating circumstances are mere proffered "consider[ations]" for the court "in the exercise of

its discretion to impose an exceptional sentence." WASH. REV. CODE § 9.94A.390.

It is a court's discretion, and not the finding of any fact, that justifies an exceptional sentence. Discretion cannot be an element for the jury's determination. Therefore, when a defendant pleads guilty to a first degree theft of $8,000,000 agreeing to restitution in that amount, it is not the court's determination of this fact of the amount, but the determination as a matter of law that the theft was "substantially greater than typical" that justifies a departure. WASH. REV. CODE § 9.94A.390(2)(d)(ii). On review, the appellate court decides whether the factors are valid as a matter of law. *State v. Cardenas*, 129 Wash.2d 1, 5-6, 914 P.2d 57, 59 (1996).

"The underlying facts and nature of the crime committed can and should be a basis for an exceptional sentence." *State v. Perez*, 69 Wash. App. at 138. Under the SRA, "the crime of conviction became far more significant in determining the sentence." David Boerner & Roxanne Lieb, *Sentencing Reform in the Other Washington*, 28 CRIME & JUST. 71, 96 (2001). These reasons "must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category." *State v. Grewe*, 117 Wash.2d 211, 216, 813 P.2d 1238 (1991). Note, however, that a factor that is already considered in setting the standard range will not justify an exceptional sentence. *State v. Owens*, 95 Wash. App. at 626, 976 P.2d at 660 (citing *State v. Grewe*, 117 Wash.2d 211, 215-18, 813 P.2d 1238 (1991)); *State v. Perez*, 69 Wash. App. at 137. The defendant's conduct or circumstances must be "more egregious" than typically associated with the crime, "more onerous" than what the Legislature contemplated when setting the standard range. *State v. Cardenas*, 129

Wash.2d 1, 914 P.2d 57 (1996); *State v. Perez*, 69 Wash. App. at 138, *State v. Weaver*, 46 Wash. App. 35, 43, 729 P.2d 64 (1986), *review denied* 107 Wash.2d 1031(1987). Nor may the court justify an exceptional sentence with "elements of a more serious crime or additional crimes." WASH. REV. CODE § 9.94A.370(2).

In a recent unanimous opinion, the Washington Supreme Court has repeated that a sentencing court may depart from the standard range so long as an explanation is provided for an appellate court's review.

> The only restriction on discretion is a requirement to articulate a substantial and compelling reason for imposing an exceptional sentence. The reason relied on by the court may be one of the considerations listed in RCW 9.94A.390, but it need not be. The guidelines are intended only to structure discretionary decisions affecting sentences; they do not specify that a particular sentence must be imposed. Since nothing in these guideline statutes requires a certain outcome, the statutes create no constitutionally protectable liberty interest.

State v. Baldwin, 150 Wash.2d 448, 78 P.3d 1005 (2003) (en banc).

This is a requirement for transparency and nothing more. The court's explanation need not be one of the factors provided in an illustrative list. *Id.* Case law has expanded on this list. *See State v. Pryor*, 115 Wash.2d 445, 799 P.2d 244 (1990) (holding that future dangerousness is a valid aggravating factor in sex offenses).

In his discretion, the Honorable Judge Sperline determined that Mr. Blakely's deliberate cruelty in

"repeatedly and protractedly confining his victim in a coffin-like box" and his deliberate cruelty toward and intimidation of a minor child in committing the domestic violence kidnapping in the manner described was not deserving of a 49-53 month sentence "considering the purposes of chapter 9.94A RCW" but presented "substantial and compelling reasons" for an upward departure to the "just and deserved" sentence of 90 months. J.A. 49. This application demonstrates the operation of the statute. It was not factors of "deliberate cruelty" or "in the presence of a minor" per se that caused the upward departure. Nor was it the undisputed facts of confinement in a coffin and commission in the presence of a minor child which caused the departure. It was the court's discretionary determination that the purposes of the SRA were not served in imposing a sentence of 49-53 months for an atypically egregious second degree kidnapping, i.e., a question of law.

3. The Washington Court's Interpretation of State Law is Authoritative.

In *Apprendi*, this Court interpreted ARIZ. REV. STAT. § 13-703 and found it constitutional. This Court interpreted the statutory language to mean that "the jury makes all of the findings necessary to expose the defendant to a death sentence." *Apprendi*, 530 U.S. at 496-97; *Ring*, 536 U.S. at 603.

In *Ring*, the Court noted that it had misunderstood the operation of ARIZ. REV. STAT. § 13-703 in deciding *Walton v. Arizona*, 497 U.S. 639 (1990). *Ring*, 536 U.S. at 603-04. It had become clear that the Arizona Supreme Court interpreted the statute differently: that the

"[d]efendant's death sentence required the judge's factual findings." *Ring*, 536 U.S. at 603. Finding the state court's construction of state law authoritative, this Court determined the aggravating factor functioned effectively as an element of the crime. *Ring*, 536 U.S. at 603 (citing *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975)). *See also Winters v. New York*, 335 U.S. 507, 514 (1948) (A state court's interpretation of a statute "puts these words in the statute as surely as if it had been so amended by the legislature.")

It is apparent that but for the Arizona Supreme Court's interpretation, this Court would have upheld the defendant's sentence in *Ring* and would not have reversed *Walton*.

However, Washington courts have *not* construed the SRA in the way that the Arizona Supreme Court construed ARIZ. REV. STAT. § 13-703. No finding of fact is required for the imposition of an exceptional sentence. Absent the Arizona Supreme Court's interpretation, this Court would have upheld *Walton* on the statutory language alone. *Apprendi*, 530 U.S. at 496-97; *Jones v. United States*, 526 U.S. 227, 239 (1999) ("where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter"). The Washington statute is even clearer in establishing the statutory maximum and describing the mechanism of structured discretion composed of standard ranges and exceptional sentences. The Washington court's construction of the Washington statute, likewise, is authoritative. *Mullaney v. Wilbur*, 421 U.S. at 691.

4. The Arizona Death Penalty Statute Is Not Properly Compared with the Washington Sentencing Guidelines.

The *Ring* case is a death penalty case at its core, and "there is no doubt that death is different." *Ring*, 536 U.S. at 605-06. Context is pivotal in statutory construction, because "a word is known by the company it keeps." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995).

The Washington death penalty statute is not a part of the SRA, but is codified in an entirely different chapter at WASH. REV. CODE § 10.95. In Washington state, the only crime for which the death penalty is available is premeditated murder with a finding of at least one of the fourteen aggravating factors therein enumerated. The factor, by legislative definition and effect, is an element of the crime and must be found by a jury. WASH. REV. CODE § 10.95; 11 *Washington Pattern Jury Instructions: Criminal*, WPIC 30.0-30.04 (2d ed. 1994). Although the statute has not been re-written since the decisions in *Apprendi* and *Ring*, it clearly complies with this Court's holdings.

The SRA and in particular the sections regarding exceptional sentences, which require transparency of the court's discretionary decision within a fixed range, are incomparable with ARIZ. REV. STAT. § 13-703. The difference between life imprisonment and the death penalty is qualitative and deserving of special protections, whereas the difference between a standard range and the statutory maximum is quantitative and a proper discretionary matter. *See also State v. Xaviar*, 117 Wash. App. 196, 205-06, 69 P.3d 901, 906-07 (2003) (distinguishing *Ring*, noting that the Washington and Arizona statutes are fundamentally different, and interpreting the Washington statute).

The Arizona statute provides a finite or exhaustive list of ten specific and enumerated factors, any finding of which may raise the penalty to death. The finder of fact is ordered to find one of these factors before imposing a death sentence. The Washington statute, on the other hand, provides an illustrative list of considerations. The sentencing judge is invited to consider these circumstances and others in determining in his or her discretion whether a standard range or exceptional sentence better serves the purposes of the SRA. In imposing an exceptional sentence, a court may not base its decision on factors already considered in setting the standard range or on elements of a different or more serious crime, i.e., factors that are clearly elements. It is evident that what remains, and in particular the findings of the court at Mr. Blakely's sentencing hearing regarding the cruelty toward a child witness, are traditional and appropriate sentencing factors and not elements.

B. The Washington Courts' Construction of the SRA Is a Meaningful Interpretation of Legislative Intent That Does Not Manipulate the Definition of Criminal Acts to Avoid Constitutional Requirements, But Rather Identifies Traditional Nonexclusive Sentencing Factors to Guide Judicial Sentencing Discretion Within the Statutory Limits.

The Legislature has substantial discretion to define crimes and prescribe punishment. *Patterson v. New York*, 432 U.S. 197, 210 (1997). The *Apprendi* line of cases has expressed concern with the government's possible manipulation of the elements of crime. The government may not

shift the burden of proof on criminal elements. *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Jones v. United States*, 526 U.S. 227 (1999). In *Jones* and *Apprendi*, this Court imposed a due process restraint on governments that focuses on the statutory maximum penalty. Thus, when a sentence exceeds this maximum, the fact which resulted in the sentence is effectively an element subject to the Jury Clause.

Such a manipulation does not exist in the Washington statute. The Court of Appeals affirmed Mr. Blakely's exceptional sentence solely on the basis of the effect of the crime on the witnessing son, not on the victim mother. J.A. 17-18. *See also* VRP2[6] 42 ("Mr. Blakely . . . put his son in the position of frantically reporting that to anyone he could notify. To watching it happen. That circumstance must forever imprint and distort the way that this child will think of his parents. Both of his parents.") The Respondent is unaware of any crime which has as an element the infliction of psychological trauma *on a witness*. Certainly such a factor has never been an element of the crime of kidnapping. *State v. Berry*, 200 Wash. 495, 505, 93 P.2d 782, 787 (1939) (The statutory definition of kidnapping does not omit any element of the common law definition).

Washington statutes do not remove elements from the jury's determination, but delineate various degrees of kidnapping, i.e., first degree kidnapping (a class A felony under WASH. REV. CODE § 9A.40.020), second degree kidnapping (a class B felony under WASH. REV. CODE

[6] VRP2 is the supplementary Verbatim Report of Proceedings transcribed by Official Court Reporter Joel Case for the sentencing hearing on July 31, 2000.

§ 9A.40.030), unlawful imprisonment (a class C felony under WASH. REV. CODE § 9A.40.040), and first and second degree custodial interference (a class C felony or misdemeanor under WASH. REV. CODE § 9A.40.060).

Under the 1909 criminal code, there was only one degree of kidnapping and it was punishable by a maximum term of life imprisonment. Seth A. Fine & Douglas J. Ende, *Washington Practice* Vol. 13A, §1603 (2d ed.1998). Under such a sentencing scheme, the judge had brought discretion to impose any sentence from no jail time to life and was not required to explain the basis for the decision. In 1933, the law provided for two degrees of kidnapping. *Id.* The maximum penalty for first degree kidnapping was death or life imprisonment at the jury's discretion. *Id.* The maximum penalty for second degree kidnapping was ten years imprisonment. *Id.* Further changes to the statute have not altered this ten year maximum, although the lesser crimes of unlawful imprisonment and first and second degree custodial interference further break down the crime into degrees. *Id.* It is clear that the legislature has not manipulated or re-labeled the code to avoid the *Apprendi* rule and shift the burden on elements. The legislature's decision to require some procedural safeguard or transparency with respect to discretionary sentencing decisions should not and does not render the exercise of such discretion constitutionally impermissible.

The non-exclusive, merely illustrative considerations in WASH. REV. CODE § 9.94A.390 are not traditional elements of crime. They do not regard or modify any particular crime, but may be significant in any crime (e.g. prior unscored criminal history not accounted for in offender score (WASH. REV. CODE § 9.94A.390(2)(j))). They are not black and white considerations resulting in mandatory penalties (e.g. armed/not armed (WASH. REV. CODE

§ 9.94A.310(4)), but complicated considerations properly weighed with a court's discretion (e.g. was defendant's cruelty, abuse of trust, or number of concurrent offenses significant enough to warrant a departure from the standard range and to what degree?). The considerations are not purely factual and not delimited in a finite and articulable list. Therefore, they are impossible to present to a jury.

The factors that determine the standard range, i.e., offender's criminal history and a "seriousness level" assigned to gross categories of crimes, represent only a small fraction of factors that traditionally inform a judge's sentencing decision. The ranges are narrow, 13-17 months in Mr. Blakely's case. It is clear that the legislature did not intend to rob the court of its sentencing discretion by mandating narrow ranges based upon the most general of factors, but only to set forth different degrees of discretion.

The Washington courts' interpretation of the statute does not evade the *Apprendi* rule, but provides the most meaningful reading of legislative intent in the context of several statutes. The context of the SRA is the rise of determinate sentencing systems which targeted "the tripartite problems of disparity, dishonesty, and [] excessive lenience." Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 883 (1990). While uniformity (i.e., the reduction of improper disparities) was a significant goal of determinate sentencing, *strict* uniformity demanding standard range sentences based on limited and general factors (offender score and seriousness level under the system of the SRA) destroys proportionality. Under a strictly uniform or charge offense system such as would result under the Petitioner's proposal, offenders are

sentenced for hypothetical, standard crimes rather than actual offenses. Dall, *supra*, at 1634 ("A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offense of which the defendant was convicted.")

Uniformity is not a greater end than individually tailored sentences based on traditional goals of retribution, deterrence, incapacitation, and rehabilitation. Reformers balanced the contrary goals of uniformity and individualized sentencing by structuring the court's discretion, providing absolute judicial discretion within narrow standard ranges and reduced discretion outside the range but within statutory limits. Dall, *supra*, at 1624 ("The legislative history suggests that Congress sought not to eliminate judicial discretion at sentencing but to limit that discretion in a meaningful and appropriate way while maintaining an individualized criminal justice system.")

In the words of Washington's own reformers:

> Recognizing that the solution to what was perceived as excessive judicial discretion was not to reject discretion entirely, the reformers sought instead the right mix of rule and discretion, the proper balance between the need for articulated principles governing sentencing and for flexibility to depart from the consequences of those principles when necessary to achieve a just result.

Boerner & Lieb, *supra*, at 123.

The departure function of determinate systems maintains judicial discretion within legislative limits and maintains individualized sentencing. Departures, then, are an essential part of the determinate sentencing

system. By undermining departures, the Petitioner is effectively asking this Court to find determinate sentencing schemes unconstitutional.

This Court has not found that U.S. sentencing guidelines are unconstitutional. The Washington guidelines are even more protective than the federal guidelines of a defendant's rights, as they prohibit the use of aggravating factors that duplicate crimes which could have been charged separately. WASH. REV. CODE § 9.94A.370(2) ("Real Facts Doctrine").

In the context of determinate sentencing systems, statutory language mandating transparency and reviewability was a response to criticism that indeterminate sentences had been dishonest. Dall, *supra*, at 1621. Departures are reviewed so that sentencing courts do not abuse their discretion but adequately support their decisions with evidence and reason on the record. The Petitioner misconstrues this language as creating a second and conflicting statutory maximum. No such conflict exists.

IV. The Defendant Received Notice of the Maximum Penalty of Ten Years.

A most appealing rationale of the *Apprendi* rule is protection of the constitutional rights of defendants to have notice of the crimes with which they are charged and the penalties to which they may be subject. *Ring*, 536 U.S. at 576 (Thomas, J., dissenting); *Apprendi*, 530 U.S. at 478 (recognizing the value in the "defendant's ability to predict with certainty the judgment from the face of the felony indictment"); *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring); *Almendarez-Torres v. United States*, 523 U.S. 224, 271 (1998) (Scalia, J., dissenting) ("it seems to me a sound

principle that whenever Congress wishes a fact to increase the maximum sentence without altering the substantive offense, it must make that intention unambiguously clear"); Bibas, *supra*, at 1139-42; Benjamin J. Priester, *Sentenced for a "Crime" the Government Did Not Prove: Jones v. United States and the Constitutional Limitations on Factfinding by Sentencing Factors Rather than Elements of the Offense*, 61 LAW & CONTEMP. PROBS. 249, 293 (1998).

The *Apprendi* issue is distinctly procedural, such that the formality of notice is central. *Ring*, 536 U.S. at 572 (Thomas, J., dissenting); *Apprendi*, 530 U.S. at 488; *United States v. Montalvo*, 331 F.3d 1052, 1061 (9th Cir. 2003). *See also* Dall, *supra*, at 1670 ("In the area of crime definition, formality for formality's sake is not unreasonable.") Defendants need notice to decide whether to go to trial or plead guilty. While the defendant Apprendi received notice via the prosecutor's recommendation to seek an enhancement, the statute to which he pleaded guilty informed him that his maximum sentence was ten years. His admissions alone did not subject him to a penalty over ten years.

Mr. Blakely, on the other hand, cannot complain that he had no notice that the maximum penalty for his crimes was ten years. The maximum penalty was plain in the charging information. J.A. 76. The standard range, on the other hand, was and is always absent from the charging document – the offender score being unknown so early in a prosecution. The maximum penalty of ten years was plain in the plea statement. J.A. 63. And it was plain in the statute. WASH. REV. CODE §§ 9A.20.021(1)(b) & 9A.40.030(3). The plea statement informed the Defendant that the sentencing judge was not bound by the standard range.

J.A. 66. And the judge repeated this orally. VRP 549-50 ("[D]o you understand that even though that would be the standard range, that the judge could sentence you above the standard range if the judge found compelling reasons to do that?").

There is no notice requirement for exceptional sentences, because "[t]he possibility of an exceptional sentence always exists, and notice of that fact is inherent in the statutory provisions which create the possibility." *Gunther*, 45 Wash. App. at 758, 727 P.2d at 260 (citing D. Boerner, *Sentencing in Washington* § 9.19 (1985)). Notice would be "redundant." *Id.*

Under the notice rationale of *Apprendi*, there was no violation in the instant case.

V. There Are Significant Practical Problems with Expanding the *Apprendi* Rule as the Petitioner Proposes.

The *Apprendi* holding is to be read narrowly. *Apprendi*, 503 U.S. at 474 (emphasizing the narrow scope of its holding); *Harris*, 536 U.S. at 567 (legislatures have relied on the Court's previous opinions such that extending the *Apprendi* rule is disfavored). The Court should be cautious in extending *Apprendi*. A broad interpretation undercuts the shared legislative and judicial goal of fairness to the defendant by exposing a jury to all the negative aspects of a defendant's conduct. *See also* Costello, *supra*, at 1251-52 (arguing that an over-broad interpretation of the *Apprendi* holding may violate the separation of powers doctrine, halting debate on sentencing reform and invalidating three decades of nationwide reform). Also "the States' settled expectations deserve [this

Court's] respect. . . . *Apprendi* can be read as leaving in place many reforms designed to reduce unfairness in sentencing." *Ring*, 536 U.S. at 613 (Kennedy, J., concurring).

The Petitioner urges that every fact that affects the sentencing judge's decision should be found beyond reasonable doubt by a jury. This is not the law. *Apprendi* does not require that a jury determine any fact relevant to sentencing, but only those facts that raise the statutory maximum sentence. As long as the defendant's sentence does not exceed the statutory maximum, the defendant was not punished for a crime different than that proven to the jury. Moreover, the Petitioner's demand is impractical. There are "far too many potentially relevant sentencing factors [ ] to permit submission of many or all of them to a jury." Costello, *supra*, at 1254 & n.358.

It is impractical, if not impossible, for the prosecutor at the point of charging to know with prescience every detail of this particular crime and criminal that a sentencing court may find significant and to present these various facts as elements for the jury's verdict.

A prosecutor's time line is hurried. At the time that the offense is first reported, the prosecutor knows the bare minimum: e.g. that it is alleged that Mr. Blakely abducted his wife and son by force and threat of force. The state can only hold a suspect for 72 hours without charging. WASH. CRIM. R. 3.2.1(f)(1). If no charge is filed, the suspect must be released to the community where he or she may flee or reoffend. So the prosecutor charges on allegations of the bare elements. At this point, it is impossible for the prosecutor to know and charge every fact that might be relevant

to sentencing. It "makes little sense" to require the state to commit to what amounts to a sentence recommendation prior to trial when such recommendation would be ill-informed. *Gunther*, 45 Wash. App. at 758, 727 P.2d at 260.

If the defendant is charged and detained in jail, the state must proceed to trial within 60 days under the court rule for speedy trial. WASH. CRIM. R. 3.3(b)(1). Although the prosecutor and police investigate throughout this period, the witness testimony can never be fully anticipated. Details may emerge for the first time in trial testimony. It is not practical then to require the prosecutor to draft a jury instruction *before* the trial commences listing all facts that possibly may be relevant to the judge's sentencing decision.

It is not even practical to require the prosecutor to anticipate the sentencing court's discretionary rationale *after* trial. In Mr. Blakely's case, the Honorable Judge Sperline determined the reasons for an exceptional sentence without any assistance from the prosecutor. Although the court emphasized certain uncontested facts that informed its decision, the court's rationale that the crime was atypical and undeserving of a standard range sentence was its own discretionary assessment. The court is entitled to such discretion independent of the prosecutor.

Recalling a jury for a punishment phase is neither constitutionally required, nor practical. The *amicus* brief authored by the ACLU suggests the additional jury trials mandated by the Petitioner's claim are manageable in Washington state, because the number of exceptional sentences is a small percentage of all sentences. While it is

true that exceptional sentences are rare, it does not follow that jury sentencing on exceptional factors is manageable.

In 2002, only 4.21% (1173/27835) of all adult felony sentences in Washington were exceptional. State of Washington Sentencing Guidelines Commission, *Statistical Summary of Adult Felony Sentencing - Fiscal Year 2002*, 24 (2003) (visited January 14, 2004) <http://www.sgc.wa.gov/Stat%20Report%202002.pdf>. Exceptional sentences upward accounted for 2.26% (628/27835) of adult felony sentences; exceptional sentences downward accounted for 1.76% (490/27835); and exceptional sentences within the standard range (imposing conditions not normally available) accounted for 0.20% (55/27835). Id. However, the *amicus* fails to take into account that the vast number of convictions, about 95%, result from pleas. Under Petitioner's proposal, it is not 4.21% of trials that will conclude in jury trials at sentencing, but 4.21% of convictions.[7]

Looking at Washington caseload statistics, 34,353 (32,572+40+1741) defendants were found guilty in 2002. Of those, only 1741 went to trial. Washington Courts, *Superior Court Annual Caseload Report 2002*, 24 (visited January 14, 2004) <http://www.courts.wa.gov/caseload/superior/ ann/atbl02.pdf>. Seventy percent of all criminal trials were jury trials (1712/748+1712). Applying this percentage to trials resulting in conviction, we can estimate that about 1219 defendants were found guilty after a jury trial. If every exceptional sentence required another

[7] Note that these figures still underestimate the increase in trials under the Petitioner's demand, because they do not take into account the number of times the state requests but does not receive an exceptional sentence.

jury trial, there would have been another 1446 (34,353 x 4.21%) trials or more than twice the number of criminal jury trials across the state. If only exceptional sentences *upward* went to jury trials, another 776 (34,353 x 2.26%) trials would have clogged the courts.[8] Note that in 2002, there were only 395 jury verdicts on civil matters. Washington Courts, *Superior Court Annual Caseload Report 2002*, 23 (visited January 14, 2004) http://www.courts.wa.gov/caseload/superior/ann/atbl02.pdf. The increase in jury trials under Petitioner's proposal would not be manageable.

From another perspective, re-labeling sentencing factors as elements not only usurps judicial sentencing discretion in contravention of legislative intent, but also shifts the power to prosecutors who may choose to selectively charge these factors on high profile cases in order to control the sentence. *Harris*, 536 U.S. at 571 (Breyer, J., concurring); Dall, *supra*, at 1672-73. "Potentially, under such a scheme, the tail of sentencing wags the dog of the crime." Dall, *supra*, at 1672.

The Petitioner's proposed extension of the *Apprendi* rule is unmanageable and poor policy.

[8] The statistic of significance should include all exceptional sentences, not just upward departures, because "[t]he Government, like the defendant, is entitled to resolution of the case by verdict from the jury . . . ." *Richardson v. United States*, 468 U.S. 317, 326 (1984).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted:

JOHN D. KNODELL
Prosecuting Attorney
Counsel of Record
TERESA J. CHEN
Deputy Prosecuting Attorney
P.O. Box 37
Ephrata, WA 98823
(509) 754-2011

January 23, 2004

APPENDIX

UNITED STATES CONSTITUTION

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

RELEVANT PROVISIONS OF THE REVISED CODE OF WASHINGTON AS THEY EXISTED IN 1998 AT THE TIME OF THE COMMISSION OF THE CRIME

Chapter 9.94A
Sentencing Reform Act of 1981

9.94A.010 Purpose.

The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to:

(1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;

(2) Promote respect for the law by providing punishment which is just;

(3) Be commensurate with the punishment imposed on others committing similar offenses;

(4) Protect the public;

(5) Offer the offender an opportunity to improve him or herself; and

(6) Make frugal use of the State's resources.

This section was revised in 1999 to amend (6) and add (7):

(6) Make frugal use of the state's and local governments' resources; and

(7) Reduce the risk of reoffending by offenders in the community.

9.94A.100 Plea agreements – Criminal history.

The prosecuting attorney and the defendant shall each provide the court with their understanding of what the defendant's criminal history is prior to a plea of guilty pursuant to a plea agreement. All disputed issues as to criminal history shall be heard at sentencing.

This section has been revised as WASH. REV. CODE § 9.94A.441.

9.94A.110 Sentencing hearing – Time period for holding – Presentence reports – Victim Impact statement and criminal history – Arguments – Record.

. . . The court shall consider the presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed. . . .

This section has been revised as WASH. REV. CODE § 9.94A.500.

9.94A.120 Sentences.

When a person is convicted of a felony, the court shall impose a punishment as provided in this section.

(1) Except as authorized in subsections (2), (4), (5), (6), and (8) of this section, a court shall impose a sentence within the sentence range for the offense.

(2) The court may impose a sentence outside the standard sentencing range for that offense if it finds, considering the purposes of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

(3) Whenever a sentence outside the standard range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard range shall be a determinate sentence.

. . . .

(13) Except as provided under RCW 9.94A.140(1) and 9.94A.142(1), a court may not impose a sentence providing for a term of confinement or community supervision or community placement which exceeds the statutory maximum crime as provided in chapter 9A.29 RCW.

Section.120 has since been revised as WASH. REV. CODE *§ 9.94A.505 and reads in relevant part:*

(1) When a person is convicted of a felony, the court shall impose punishment as provided in this chapter.

(2)(a) The court shall impose a sentence as provided in the following sections and as applicable in the case:

(i) Unless another term of confinement applies, the court shall impose a sentence within the standard sentence range established in RCW 9.94A.510

. . .

(xi) RCW 9.94A.535, relating to exceptional sentences;

. . . .

(5) Except as provided under RCW 9.94A.750(4) and 9.94A.753(4), a court may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.

9.94A.210 Which sentences appealable – Procedure – Grounds for reversal – Written opinions.

(1) A sentence within the standard for the offense shall not be appealed. For purposes of this section, a sentence imposed on a first-time offender under RCW 9.94A.120(5) shall also be deemed to be within the standard sentence range for the offense and shall not be appealed.

(2) A sentence outside the standard sentence range for the offense is subject to appeal by the defendant or the state. The appeal shall be to the court of appeals in accordance with rules adopted by the supreme court.

(3) Pending review of the sentence, the sentencing court or the court of appeals may order the defendant confined or placed on conditional release, including bond.

(4) To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

(5) A review under this section shall be made solely upon the record that was before the sentencing court. Written

briefs shall not be required and the review and decision shall be made in an expedited manner according to rules adopted by the supreme court.

(6) The court of appeals shall issue a written opinion in support of its decision whenever the judgment of the sentencing court is reversed and may issue written opinions in any other case where the court believes that a written opinion would provide guidance to sentencing judges and others in implementing this chapter and in developing a common law of sentencing within the state.

(7) The department may petition for a review of a sentence committing an offender to the custody or jurisdiction of the department. The review shall be limited to errors of law. Such petition shall be filed with the court of appeals no later than ninety days after the department has actual knowledge of terms of the sentence. The petition shall include a certification by the department that all reasonable efforts to resolve the dispute at the superior court level have been exhausted.

Section .210 has since been revised as WASH. REV. CODE § 9.94A.585

9.94A.310 Table 1 – Sentencing Grid.

(1) Sentencing grid for crimes committed after July 26, 1997.

(The portion of the grid provided below illustrates the standard ranges for a crime of seriousness level V depending on offender scores 0 through 9 or more.)

	0	1	2	3	4
V	6-12m	12-14m	13-17	15-20	22-29

	5	6	7	8	9 or more
V	33-43	41-54	51-68	62-82	72-96

9.94A.320 Table 2 – Crimes included within each seriousness level.

(This section lists crimes grouped by seriousness levels I-XV. Kidnapping in the second degree is listed under seriousness level V. This section has been revised as WASH. REV. CODE § 9.94A.515.)

9.94A.370 Presumptive sentence.

. . . .

(2) In determining any sentence, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. Acknowledgment includes not objecting to information stated in the presentence reports. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence. Facts that establish the elements of a more serious crime or additional crimes may not be used to go outside the standard

sentencing range except upon stipulation or when specifically provided for in RCW 9.94A.390(2) (c), (d), (f), and (g).

Section.370 has since been revised as WASH. REV. CODE § 9.94A.530.

9.94A.390 Departures from the guidelines.

If the sentencing court finds that an exceptional sentence outside the standard range should be imposed in accordance with RCW 9.94A.120(2), the sentence is subject to review only as provided for in RCW 9.94A.210(4).

The following are illustrative factors which the court may consider in the exercise of its discretion to impose an exceptional sentence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(1) Mitigating Circumstances

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct or to conform his or conduct to the requirements of the law, was significantly impaired (voluntary use of drugs or alcohol is excluded).

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The operation of the multiple offense policy of RCW 9.94A.400 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(2) Aggravating Circumstances

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance due to extreme youth, advanced age, disability, or ill health.

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors.

(i) The current offense involved multiple victims of multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially greater than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g. pharmacist, physician, or other medical professional).

(f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.127.

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(h) The current offense involved domestic violence, as defined in RCW 10.99.020 and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(i) The operation of the multiple offense policy of RCW 9.94A.400 results in a presumptive sentence that is clearly too lenient in light of the purposes of this chapter, as expressed in RCW 9.94A.010.

(j) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter as expressed in RCW 9.94A.010.

(k) The offense resulted in the pregnancy of a child victim of rape.

Section.390 has since been revised as WASH. REV. CODE § 9.94A.535. The revised section adds the following preface:

The court may impose a sentence outside the standard sentence range for an offense it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Whenever a sentence outside the standard sentence range is imposed the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard range shall be a determinate sentence unless it is imposed on an offender sentenced under RCW 9.94A.712. An exceptional sentence imposed on an offender sentenced under RCW 9.94A.712 shall be to a minimum term set by the court and a maximum term equal to the statutory maximum sentence for the offense of the conviction under chapter 9A.20 RCW.

9.94A.420 Presumptive ranges that exceed the statutory maximum.

If the presumptive sentence duration given in the sentencing grid exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence.

Section.420 has since been revised as WASH. REV. CODE § 9.94A.599. The revised section adds the following sentence:

If the addition of a firearm or deadly weapon enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

Chapter 9A.20
Classification of Crimes

9A.20.010 Classification and designation of crimes.

(1) Classified Felonies.

(a) The particular classification of each felony defined in Title 9A RCW is expressly designated in the section defining it.

(b) For purposes of sentencing, classified felonies are designated as one of three classes, as follows:

(i) Class A felony; or

(ii) Class B felony; or

(iii) Class C felony.

(2) Misdemeanors and Gross Misdemeanors.

(a) Any crime punishable by a fine of not more than one thousand dollars, or by imprisonment in a county jail for not more than ninety days, or by both such fine and imprisonment is a misdemeanor. Whenever the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is

imposed, the committing of such act shall be a misdemeanor.

(b) All crimes other than felonies and misdemeanors are gross misdemeanors.

9A.20.021 Maximum sentences for crimes committed July 1, 1984, and after.

(1) Felony. Unless a different maximum sentence for a classified felony is specifically established by statute, no person convicted of a classified felony shall be punished by confinement or fine exceeding the following:

(a) For a class A felony, by confinement in a state correctional institution for a term of life imprisonment, or by a fine in an amount fixed by the court of fifty thousand dollars, or by both such confinement and fine;

(b) For a class B felony, by confinement in a state correctional institution for a term of ten years, or by a fine in an amount fixed by the court of twenty thousand dollars, or by both such confinement and fine;

(c) For a class C felony, by confinement in a state correctional institution for five years, or by a fine in an amount fixed by the court of ten thousand dollars, or by both such confinement and fine.

(2) Gross misdemeanor. Every person convicted of a gross misdemeanor defined in Title 9A RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than one year, or by a fine in an amount fixed by the court of not more than five thousand dollars, or by both such imprisonment and fine.

(3) Misdemeanor. Every person convicted of a misdemeanor defined in Title 9A RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than ninety days, or by a fine in an amount fixed by the court of not more than one thousand dollars, or by both such imprisonment and fine.

(4) This section applies to only those crimes committed on or after July 1, 1984.

Chapter 9A.40
Kidnapping, unlawful imprisonment, and custodial interference

* * *

9A.40.020 Kidnapping in the first degree.

(1) A person is guilty of kidnapping in the first degree if he intentionally abducts another person with intent:

(a) To hold him for ransom or reward, or as a shield or hostage; or

(b) To facilitate commission of any felony or flight thereafter; or

(c) To inflict bodily injury on him; or

(d) To inflict extreme mental distress on him or a third person; or

(e) To interfere with the performance of any governmental function.

(2) Kidnapping in the first degree is a class A felony.

9A.40.030 Kidnapping the second degree.

(1) A person is guilty of kidnapping in the second degree if he intentionally abducts another person under circumstances not amounting to kidnapping in the first degree.

(2) In any prosecution for kidnapping in the second degree, it is a defense if established by the defendant by a preponderance of the evidence that (a) the abduction does not include the use of or intent to use or threat to use deadly force, and (b) the actor is a relative of the person abducted, and (c) the actor's sole intent is to assume custody of that person. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, any other crime.

(3) Kidnapping in the second degree is a class B felony.

51
1571

Supreme Court, U.S.
FILED
FEB 25 2004
OFFICE OF THE CLERK

(14)

No. 02-1632

IN THE
Supreme Court of the United States

RALPH HOWARD BLAKELY, JR.
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

On Writ of Certiorari
to the Washington Court of Appeals, Division III

REPLY BRIEF FOR PETITIONER

JEFFREY L. FISHER
Counsel of Record
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150

TABLE OF CONTENTS

REPLY BRIEF FOR PETITIONER 1

I. The Top of a Standard Sentencing Range in Washington Is a "Statutory Maximum" as a Matter of Federal Law. 2

A. *Apprendi* Defines a Statutory Maximum as the Harshest Statutory Sentence That May Be Imposed Based Solely on a Guilty Verdict..... 2

B. Identification of a Statutory Maximum Does Not Turn on Whether the Legislature Intended to Evade *Apprendi.* 3

II. Neither the "Illustrative" Nor the "Qualitative" Nature of Washington's Enumerated Aggravating Factors Removes Them From the Purview of *Apprendi.* 5

A. The Sentencing Reform Act Requires a Sentencing Judge to Find a Legislatively Designated Type of Fact in Order to Impose an Exceptional Sentence. 5

B. Washington's System for Imposing Exceptional Sentences Upward Operates in All Relevant Legal Respects the Same as the Arizona System Invalidated in *Ring.* 9

1. The *Apprendi* rule does not contain an exception for statutory provisions that may be satisfied by either enumerated or analogous, unenumerated factors..... 10

2. The *Apprendi* rule does not contain an exception for statutory provisions that allow sentencing courts to employ "qualitative judgments." 12

III. Applying *Apprendi* Here Would Not Threaten Structured Sentencing Systems 16

A. Washington's Sentencing Reform Act Could Conform to *Apprendi* by Making Modest Statutory Changes. 17

B. Washington Could Conform to *Apprendi* Without Any Significant Practical Difficulties. 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases:

Apprendi v. New Jersey, 530 U.S. 466 (2000) ..... passim

Duncan v. Louisiana, 391 U.S. 145 (1968) 16

Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726 (1973) 11

Harris v. United States, 536 U.S. 545 (2002) 14

Hughey v. United States, 495 U.S. 411 (1990) 11

In re Winship, 397 U.S. 358 (1970) 4, 19

Jones v. United States, 526 U.S. 227, 230 (1999) 11, 13, 14

Michael M. v. Superior Court, 450 U.S. 464 (1981) 4

Mullaney v. Wilbur, 421 U.S. 684 (1975) 4

Palmer v. Thompson, 403 U.S. 217 (1971) 5

People v. Reese, 258 N.Y. 89 (1932) 19

Ring v. Arizona, 536 U.S. 584 (2002) ..... passim

State v. Alexander, 70 Wn. App. 608, 854 P.2d 1105 (1993) 6

State v. Ammons, 105 Wn.2d 175, 718 P.2d 796 (1986) 6

State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003) 8

State v. Borg, 145 Wn.2d 329, 36 P.3d 546 (2001) 9

State v. Cardenas, 129 Wn.2d 1, 914 P.2d 57 (1996) 3, 7, 15

State v. Chadderton, 119 Wn.2d 390, 832 P.2d 481 (1992) 7, 8

State v. Gore, 143 Wn.2d 288, 21 P.3d 262 (2001) 3, 7, 9

State v. Nass, 76 Wn. 2d 368, 456 P.2d 347 (1969) 20

State v. Strauss, 54 Wn. App. 408, 773 P.2d 898 (1989) 8

State v. Talley, 83 Wn. App. 750, 923 P.2d 721 (1996), *aff'd*, 134 Wn.3d 176, 949 P.2d 358 (1998) 9

Statutes:

18 U.S.C. § 2119(2) 11
Ariz. Rev. Stat. § 13-703(F) 13
Wash. Rev. Code § 9.94A.120 13
Wash. Rev. Code § 9.94A.120(2) 6
Wash. Rev. Code § 9.94A.120(3) 8
Wash. Rev. Code § 9.94A.120(14) 3
Wash. Rev. Code § 9.94A.125 19
Wash. Rev. Code § 9.94A.310 ..... 3, 4
Wash. Rev. Code § 9.94A.310(4) 19, 20
Wash. Rev. Code § 9.94A.310(5)-(7) 20
Wash. Rev. Code § 9.94A.390 7
Wash. Rev. Code § 9.94A.390(2) 6
Wash. Rev. Code § 9A.20.021 3
Wash. Rev. Code § 9A.20.021(1) 20

Other Authority:

Davilas, Christina N., *Prosecutorial Sentence Appeals: Reviving the Forgotten Doctrine in State Law as an Alternative to Mandatory Sentencing Laws*, 87 Cornell L. Rev. 1259 (2002) 18

Eskridge, William K., Jr., et al., Cases and Materials on Legislation (3d ed. 2001) 11

Frase, Richard S., *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 St. Louis U. L.J. 425 (2000) 18

Washington Sentencing Guidelines Commission, *Statistical Summary of Adult Felony Sentencing - Fiscal Year 2002* (2003) <http://www.sgc.wa.gov/Stat%20Report%202002.pdf> ("*2002 Statistical Summary*") 6, 19, 20

REPLY BRIEF FOR PETITIONER

This Court's holding in *Ring v. Arizona,* 536 U.S. 584 (2002), is straightforward and clear-cut: The *Apprendi* rule applies to any aggravating fact necessary to expose a defendant to punishment beyond an otherwise mandatory statutory limit. As Petitioner explained in his opening brief, that is exactly the situation here. Washington's Sentencing Reform Act, just like the Arizona capital sentencing system at issue in *Ring*, authorizes a court to increase punishment above an otherwise mandatory statutory limit only if it finds a particular kind of aggravating fact. Washington provides an illustrative list of such facts, and the increased punishment in this case is based upon one of the very same enumerated aggravators (cruelty) that the sentencing judge invoked in *Ring*.

The State and its *amici* try to distinguish Washington's system from Arizona's based upon amorphous notions of legislative "evasion," statutory "nonexclusivity" and judicial "qualitative judgments." But these contentions simply fail to come to grips with *Ring*. Whatever adjectives might be used to describe Washington's system, it remains that a Washington court, just like an Arizona court, may not impose a sentence above the standard statutory limit unless it finds a legislatively designated type of fact that is not accounted for in the guilty verdict. It is this reality that makes the *Apprendi* rule applicable here.

The State and its *amici* also exaggerate the practical implications of applying the *Apprendi* rule to structured sentencing systems. Such systems are easily adaptable to *Apprendi*'s requirements. Many states, in fact, already have guideline-type statutes that conform to *Apprendi,* and administering such a system in Washington would not place undue strain on its criminal justice system.

I. The Top of a Standard Sentencing Range in Washington Is a "Statutory Maximum" as a Matter of Federal Law.

The State argues that the top of a standard range in Washington is not actually a "statutory maximum" under *Apprendi* for two reasons: (A) Washington law labels the longest permissible exceptional sentence "the statutory maximum" sentence, Resp. Br. at 17-19, 26-27; and (B) the Washington Legislature did not intend to "manipulate" the elements of crimes or to "evade" the *Apprendi* rule in enacting the aggravating-facts portion of the Sentencing Reform Act. Resp. Br. at 29-32. Neither argument withstands scrutiny.

A. *Apprendi* Defines a Statutory Maximum as the Harshest Statutory Sentence That May Be Imposed Based Solely on a Guilty Verdict.

The question whether a certain sentencing threshold is a "statutory maximum" for purposes of *Apprendi* is unquestionably one of federal law. Both *Apprendi* and *Ring* involved state criminal sentencing statutes, yet this Court proceeded in both cases to determine whether the sentencing threshold at issue constituted such a maximum. In each opinion, this Court defined "statutory maximum" as "the maximum [the defendant] would receive if punished according to the facts reflected in the [guilty] verdict alone." *Id.* at 483; *see also Ring*, 536 U.S. at 604 ("the maximum punishment" the defendant could have received "[b]ased solely on the jury's verdict finding him guilty of [the charged offense]"). In other words, if the sentence a court imposes "may not legally be imposed . . . unless at least one aggravating factor is found to exist," the sentence exceeds a statutory maximum, regardless of how state law labels the particular statutory threshold that the sentence exceeds. *Ring*, 536 U.S. at 597; *see also id.* at 604; Petr. Br. at 16-17.

Under this definition, the top of a standard range dictated by Wash. Rev. Code § 9.94A.310 is a statutory maximum. That statute sets limits that a sentencing court may not exceed unless it finds at least one aggravating fact "that was not an element of the crime" of conviction. *State v. Cardenas*, 129 Wn.2d 1, 9, 914 P.2d 57 (1996); *accord State v. Gore*, 143 Wn.2d 288, 315-16, 21 P.3d 262 (2001); Resp. Br. at 24 ("a factor that is already considered in setting the standard ranges will not justify an exceptional sentence"). Only if the court finds such a fact may it impose a sentence longer than the standard statutory range.

It is true, as the State points out numerous times, that an exceptional sentence may not exceed a second cap found in Wash. Rev. Code § 9A.20.021. *See also* Wash. Rev. Code § 9.94A.120(14) (cross-referencing this provision). But the critical point here is that the top of a standard range – here, 53 months – is the maximum statutory term authorized "[b]ased solely on the [guilty] verdict." *Ring*, 536 U.S. at 597. A sentencing court has no discretion to exceed that limit unless it finds at least one valid aggravating fact.[1]

B. Identification of a Statutory Maximum Does Not Turn on Whether the Legislature Intended to Evade *Apprendi*.

The Washington Legislature's intent in enacting the aggravating-fact provisions of the Sentencing Reform Act

[1] The trial court's "notice" to Petitioner that it had the authority to find an aggravating fact and to impose an exceptional sentence of up to ten years (*see* Resp. Br. at 34-36) could not alter this reality. This notice simply explained to Petitioner the way that Washington law works – something of which all Washington citizens already have constructive notice. And providing notice of an unconstitutional sentencing procedure cannot validate that procedure. In any event, neither the State nor the trial court ever told Petitioner before he entered his plea that it might consider his conduct to involve deliberate cruelty or to implicate any other aggravating circumstance.

cannot alter the conclusion that the top of a standard range dictated by Wash. Rev. Code § 9.94A.310 constitutes a statutory maximum. Neither the right to trial by jury nor the beyond-a-reasonable-doubt rule of *In re Winship,* 397 U.S. 358 (1970), turn on legislative intent. Rather, as both *Apprendi* and *Ring* make clear, the applicability of these constitutional rules depends solely on whether a legislature has created a system under which a court may not impose a sentence exceeding a certain level unless it finds an additional fact not comprised in the guilty verdict. *See Apprendi,* 530 U.S. at 490; *Ring,* 536 U.S. at 592, 597.

The *Ring* decision is particularly instructive here. There the Arizona Legislature enacted the statutory scheme at issue with purest of motives: to comply with this Court's Eighth Amendment jurisprudence requiring that states winnow the pool of death-eligible defendants to avoid undue arbitrariness. *See Ring,* 536 U.S. at 606-07; *id.* at 610-11 (Scalia, J., concurring). Not one speck of evidence suggested that Arizona was trying to avoid any constitutional rule. Yet this Court deemed Arizona's noble intent irrelevant and unflinchingly applied *Apprendi.* "The dispositive question," this Court explained, is one of "'*effect*'": "If a State makes an increase in a defendant's authorized punishment contingent on a finding of fact, that fact . . . must be found by a jury beyond a reasonable doubt." *Ring,* 536 U.S. at 602 (quoting *Apprendi,* 530 U.S. at 494) (emphasis added); *see also Mullaney v. Wilbur,* 421 U.S. 684, 699 (1975) ("The rationale of [*Winship*] requires an analysis that looks to the *effect and operation* of the law as applied and enforced by the state.") (internal quotation omitted) (emphasis added).

This Court should not deviate from this effects-based test. Discerning the motivation of a legislative body is always "a hazardous matter," for "the search for the 'actual' or the 'primary' purpose of a statute is likely to be elusive." *Michael M. v. Superior Court,* 450 U.S. 464, 469-70 (1981) (quotation

omitted); *see also Palmer v. Thompson,* 403 U.S. 217, 225 (1971) (frequently "difficult or impossible" to determine the dominant motivation behind legislation). When the applicability of the constitutional provisions at issue do not turn on whether a legislature intended to evade them, there is no need to engage in such a troublesome inquiry.

II. Neither the "Illustrative" Nor the "Qualitative" Nature of Washington's Enumerated Aggravating Factors Removes Them From the Purview of *Apprendi.*

Despite the clear result that the "statutory maximum" test of *Ring* and *Apprendi* dictates here, the State, echoed by the United States, contends that Washington's Sentencing Reform Act is distinguishable from the system in *Ring* because the statutory list of potential aggravating factors in Washington is "illustrative" instead of exclusive. The State and the United States also assert that Washington's exceptional sentence system employs decisively different aggravating factors from those in *Ring* because Washington's factors involve "qualitative judgment[s]." United States Br. at 18. No Washington court has ever advanced either of these arguments. Nor has the State ever done so before its brief on the merits here. And for good reason: these efforts to distinguish *Ring* both (A) distort Washington law and (B) misconstrue the *Apprendi* rule.

A. The Sentencing Reform Act Requires a Sentencing Judge to Find a Legislatively Designated Type of Fact in Order to Impose an Exceptional Sentence.

The State and the United States suggest that the Washington Legislature "has left the judgment about which facts justify a more serious punishment to the sentencing judge" and that the Sentencing Reform Act permits judges to

impose exceptional sentences upward based on "virtually unlimited" sets of facts. United States Br. at 22, 16; *see also* Resp. Br. at 24 ("It is a court's discretion, and not the finding of any particular fact, that justifies an exceptional sentence."). These statements, however, mischaracterize Washington law. Far from granting sentencing courts open-ended discretion to decide which facts may justify imposing an exceptional sentence upward, the very point of the Sentencing Reform Act is to shift from a system in which a sentencing court has "absolute discretion to do whatever it pleases" to one in which such discretion is significantly limited by legislative directives. *State v. Ammons,* 105 Wn.2d 175, 181, 718 P.2d 796 (1986).[2]

The Act's basic requirement that aggravating facts evince a "substantial and compelling reason" to impose an exceptional sentence, Wash. Rev. Code § 9.94A.120(2), thus operates just like any other component of a criminal statute: It establishes a legal standard and then requires the factfinder (here, the sentencing court) to find facts that meet that standard. The Act sets forth eleven acceptable aggravating factors, many with numerous subparts. *See* Wash. Rev. Code § 9.94A.390(2). The vast majority of exceptional sentences in Washington rest on one or more these enumerated factors. *See* Washington Sentencing Guidelines Commission, *Statistical Summary of Adult Felony Sentencing – Fiscal Year 2002* 44 (2003) <http://www.sgc.wa.gov/Stat%20Report%202002.pdf> (rank-

[2] In *Ammons*, in fact, the defendant argued that the Sentencing Reform Act violated Washington's separation-of-powers doctrine because it abolishes courts' absolute discretion and requires judges to rely on a statutorily permissible finding to impose a sentence above the standard range. The Washington Supreme Court rejected this argument, explaining that there was no problem with such a requirement because "the fixing of legal punishments for criminal offenses is a legislative function." *Ammons,* 105 Wn.2d at 180; *see also State v. Alexander,* 70 Wn. App. 608, 615-17, 854 P.2d 1105 (1993) (elaborating on legislative constraints on sentencing discretion of trial judges).

ing most frequently invoked aggravating facts, including vulnerable victim, deliberate cruelty, and position of trust).

To be sure, the Act provides that these enumerated aggravating factors are merely "illustrative." Wash. Rev. Code § 9.94A.390. But as the word "illustrative" implies, the Washington Supreme Court has explained that if a trial court invokes an unenumerated aggravator to justify an exceptional sentence, that factor must be "analogous" to an enumerated one. In *Cardenas,* for example, the sentencing judge departed upward in a vehicular assault case on the basis of the fact that the victim suffered multiple injuries. The Washington Supreme Court ruled that this reason was invalid because the infliction of multiple injuries is a permissible aggravating fact only when the injuries were caused by multiple acts. The Court explained:

> Requiring multiple acts is consistent with the original rationale for using multiple injuries as a valid aggravating factor, a rationale *analogous to the statutorily recognized factor of multiple incidents of major economic offenses.* [citation omitted.] Thus, where the defendant has committed multiple acts in causing the injuries, the *analogy* to multiple economic offenses is appropriate.

129 Wn.2d at 8 (emphasis added). Other decisions disallowing proposed aggravators confirm that an unenumerated aggravating factor is valid only if it is comparable to an enumerated factor. *See, e.g., Gore,* 143 Wn.2d at 321 ("Extrapolating from the statutory aggravating factors respecting economic and drug crimes, a high degree of sophistication or planning is necessary for the nonstatutory planning aggravator to justify an exceptional sentence.") (emphasis removed); *Chadderton,* 119 Wn.2d at 398 ("The

reckless abuse of trust may operate as an aggravating factor by analogy to . . . RCW 9.94A.390(c)(iv).").[3]

A sentencing court's finding of an aggravating factor, therefore, is much more than an exercise in "transparency," *compare* Resp. Br. at 22, 23, 25; it is a legislatively mandated prerequisite that the court find *a particular kind of additional fact* before imposing a sentence longer than the top of the standard range. Just as in *Ring,* of course, no specific fact need be found. But it is misleading for the State to suggest that "the judge need only articulate a reason for the departure." Resp. Br. at 21. If the trial court here had sentenced Petitioner to 90 months in prison for some "articulate[ed] reason" that was not a legitimate aggravating fact beyond the elements of his crime, the sentence would have been illegal. *See, e.g., State v. Chadderton,* 119 Wn.2d 390, 395, 832 P.2d 481 (1992) (collecting examples of invalid sentences in this regard).

Furthermore, if the trial court had relied on the legitimate aggravating factor of "deliberate cruelty with domestic violence" without also finding facts that supported that invocation, the sentence also would have been illegal. *See, e.g., State v. Strauss,* 54 Wn. App. 408, 416-19, 773 P.2d 898 (1989) (reversing such an exceptional sentence). The Sentencing Reform Act expressly provides that "[w]henever a sentence outside the standard range is imposed, the court shall set forth the reasons for its decision in written *findings of fact* and conclusions of law." Wash. Rev. Code § 9.94A.120(3)

[3] The State's suggestion that *State v. Baldwin,* 150 Wn.2d 448, 78 P.3d 1005 (2003), holds that any additional fact can be an acceptable aggravator so long as a court explicitly offers it (Resp. Br. at 25) is incorrect. There, the sentencing court imposed an exceptional sentence upward based on an enumerated aggravator, and the Washington Supreme Court noted that "any other substantial and compelling reasons may support a sentence outside the standard range." *Id.* at 459. Nothing in opinion addresses what types of factual findings satisfy the default "substantial and compelling reason" standard.

(emphasis added). Lest there be any doubt, the Washington Supreme Court has explained in no uncertain terms that there must be sufficient "*evidence in the record* to support the reasons for imposing an exceptional sentence." *Gore,* 143 Wn.2d at 315 (emphasis added); *see also State v. Talley,* 83 Wn. App. 750, 762, 923 P.2d 721 (1996) ("[A] court could find grounds for an exceptional sentence *if the State can prove the facts necessary to support them.*") (emphasis added), *aff'd,* 134 Wn.3d 176, 949 P.2d 358 (1998); *State v. Borg,* 145 Wn.2d 329, 36 P.3d 546 (2001) (finding evidence insufficient to satisfy enumerated aggravating factor).

In sum, only by invoking a legally valid aggravator and by finding facts to support that invocation does a Washington sentencing court acquire the legal authority to use what the United States calls its "qualitative judgment" to decide whether to impose an exceptional sentence upward.

B. Washington's System for Imposing Exceptional Sentences Upward Operates in All Relevant Legal Respects the Same as the Arizona System Invalidated in *Ring.*

In light of a proper understanding of Washington law, the State's and the United States' argument is that the *Apprendi* rule should not apply when: (1) a statutory prerequisite for an increased sentence is phrased in somewhat generic terms, such that it may be satisfied by illustrative enumerated factors or analogous unenumerated factors; and (2) a court's decision whether to impose a heightened sentence turns not only on whether an aggravating factor is present, but also on a "qualitative" determination of some sort.[4] The *Apprendi* rule, however, does not contain an exception for either situation.

[4] The State also suggests that this case is distinguishable from *Ring* because factual findings exposing a defendant to an increased prison term should be treated differently under *Apprendi* than findings exposing a defendant to the

1. The *Apprendi* rule does not contain an exception for statutory provisions that may be satisfied by either enumerated or analogous, unenumerated factors.

The defendant in *Ring* had his sentence increased because the judge found that his crime involved two of Arizona's ten potential aggravating circumstances, one of which was that he acted in an "especially heinous, *cruel*, or depraved manner." *Ring*, 536 U.S. at 592 n.1, 595 (emphasis added). Petitioner's sentence was increased here for almost exactly the same reason: the judge found that his offense involved one of Washington's eleven potential aggravating circumstances, namely "domestic violence with *deliberate cruelty*." J.A. 18 n.4 (emphasis added).[5] The State and the United States assert, however, that the factual finding that made Petitioner's heightened punishment possible is not subject to *Apprendi* because although the judges here and in *Ring* both relied on a legislatively specified aggravating fact of cruelty, the judge here, unlike the judge in *Ring*, could have relied instead on an analogous, unenumerated factor.

This assertion makes no sense. Neither *Ring* nor any other of this Court's opinions indicates that the *Apprendi* rule applies only when an enumerated list of permissible aggravating factors is exclusive and lacks any generally

---

death penalty. Resp. Br. at 28-29. But, as Petitioner explained in his opening brief, this Court expressly held in *Ring* that the *Apprendi* rule applies with equal force in "both" situations. *Ring*, 536 U.S. at 609, *quoted in* Petr. Br. at 18. The *Apprendi* rule is a product of the Due Process Clause's *Winship* rule and the Sixth Amendment, not the Eighth Amendment or any other capital punishment doctrine.

[5] Although the State asserts at one point that Petitioner's enhanced sentence rests "solely on the basis of" the trial court's domestic violence finding, Resp. Br. at 30, the Court of Appeals' opinion on this point is crystal clear: the trial court's finding of "domestic violence *with deliberate cruelty* supports the exceptional sentence here." J.A. 18 n.4 (emphasis added).

defined "catchall" component. To the contrary, this Court consistently has held that "*any fact*" other than a prior conviction that increases the penalty for a crime beyond the prescribed statutory maximum must be proved to a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 489 (emphasis added); *see also Jones v. United States*, 526 U.S. 227, 243 n.6 (1999) ("any fact"). This is because *Apprendi*'s central concern is that a defendant not "be expose[d] . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict [or guilty plea] alone." *Ring*, 536 U.S. at 602 (quoting *Apprendi*, 530 U.S. at 483). A sentencing system violates this tenet whenever it allows a judge, on the basis of finding an additional fact, to impose a sentence beyond the statutory maximum established by the guilty verdict. The degree to which such an additional fact is legislatively specified beyond a generic statutory definition is immaterial.

Deviating to any extent from this bright-line rule would exponentially complicate the *Apprendi* doctrine, both in terms of theory and application. Legislatures often cannot foresee every permutation of a particular type of conduct. Thus, innumerable statues use "general words" to indicate a covered class and follow those words with "specific words in a statutory enumeration," thereby "restrict[ing] application of the general term to things that are similar to those enumerated." William K. Eskridge, Jr., et al., Cases and Materials on Legislation 823 (3d ed. 2001) (quotation omitted); *see also Hughey v. United States*, 495 U.S. 411, 418-19 (1990) (interpreting "catchall" statutory phrase in line with enumerated factors); *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973) ("catchall provision . . . bring[s] within a statute categories similar in type to those specifically enumerated"). Indeed, almost every statute contains at least one phrase that could be elucidated with greater specificity. There is, accordingly, no theoretical reason to distinguish between unadorned statutory classes and

statutory classes that happen to be illustrated by specific examples. For purposes of applying *Apprendi*, both statutory approaches must be treated in the same fashion.

Nor is there any sound practical reason for making the *Apprendi* rule depend on whether a statutory standard's illustrative examples are exclusive. It makes no difference to a defendant whether his sentence is increased based on a factor on an enumerated list or on some analogous factor that satisfies a more generic statutory standard. Either way, a legislature has allowed a judge to make the critical finding that leads to increased punishment. Indeed, if this Court were to accept the State's and the United States' argument, the Arizona Legislature presumably could vindicate the capital sentencing system invalidated in *Ring* by adding a general phrase such as "or any other similar reason" to its list of aggravating factors. The New Jersey Legislature could vindicate the law invalidated in *Apprendi* by adding a similar phrase to its hate-crime enhancement statute. Such "formalistic" gestures, which would not afford any increased procedural protections to defendants, cannot to satisfy the Sixth Amendment or the Due Process Clause. *See Ring*, 536 U.S. at 604.

2. The *Apprendi* rule does not contain an exception for statutory provisions that allow sentencing courts to employ "qualitative judgments."

Under the Sentencing Reform Act, as the United States notes, "the ultimate exposure of the defendant to a sentence above the presumptive range turns not solely on facts, but on the sentencing court's [and the appellate courts'] qualitative judgment that those facts provide 'substantial and compelling reasons' for an exceptional sentence." United States Br. at 8. Nothing, however, about employing this type of "qualitative judgment" removes the Act's exceptional sentence system from the purview of *Apprendi*.

(a) It is irrelevant that imposing an exceptional sentence upward is discretionary instead of mandatory.

Both the State and the United States rely heavily on the fact that the Sentencing Reform Act provides only that the court "may" impose an exceptional sentence upon finding an aggravating fact. Wash. Rev. Code § 9.94A.120. Finding such a fact does not "mandat[e]" that the court impose a heightened sentence. Resp. Br. at 21-22; United States Br. at 19-21. To the extent that this detail in Washington law can be characterized as permitting courts to employ their "qualitative judgment" regarding whether to impose an exceptional sentence, it makes no difference for purposes of applying the *Apprendi* rule.

Apprendi is not limited to facts that mandate a heightened sentence. Rather, this Court consistently has held that the *Apprendi* rule applies to any fact that causes an "increase in the defendant's *authorized* punishment." *Ring*, 536 U.S. at 602 (emphasis added).[6] The Arizona law invalidated in *Ring*, for instance, did not mandate the death penalty upon the finding of an aggravating fact; such a finding simply "authorize[d]" that penalty, subject to the judge's additional determination there were no mitigating circumstances "'sufficiently substantial to call for leniency.'" *Id.* at 593 (quoting Ariz. Rev. Stat. § 13-

---

[6] For numerous other passages using similar formulations, see *Apprendi*, 536 U.S. at 482-83 (*Apprendi* applies to "the determination of a fact that, if found, *exposes* the criminal defendant to a penalty exceeding the [otherwise-applicable] maximum") (emphasis altered); *id.* at 484 (rule applies if "defendant *faces* punishment beyond that provided by a statute" is additional fact is present) (emphasis added); *id.* at 469 (rule pertains to "a factual determination *authorizing* an increase in the maximum prison sentence") (emphasis added); *id.* at 498 (Scalia, J., concurring) (rule applies to all facts that determine "the length of the sentence to which [the defendant] is *exposed*") (emphasis added); *Jones*, 526 U.S. at 243 n.6 (rule applies any fact that "increases the *maximum penalty* for a crime") (emphasis added).

703(F)). In *Jones*, this Court likewise applied what became the *Apprendi* rule even though the additional factual finding at issue simply raised the permissible prison sentence from 15 years to "not more than 25 years." *Jones*, 526 U.S. at 230 (quoting 18 U.S.C. § 2119(2)). And in *Apprendi* itself, this Court noted that the additional finding at issue was "legally significant" not because it mandated any particular sentence, but because "it increased – indeed, it doubled – *the maximum range within which the judge could exercise his discretion.*" 530 U.S. at 474 (emphasis added).

The reason the *Apprendi* rule applies to any fact that *authorizes* increased punishment is that both the Sixth and Fourteenth Amendments apply to every factual finding that is "legally essential to the punishment to be inflicted." *Harris v. United States*, 536 U.S. 545, 561 (2002); *see also Ring*, 536 U.S. at 603-04 (if some aggravating fact must exist in order for a certain sentence to be imposed, the fact at issue must be treated as element); *Jones*, 526 U.S. at 248 (all facts that "determin[e] a statutory sentencing range" must be treated as elements). A fact that merely authorizes a sentence above an otherwise prescribed statutory limit is just as essential to such a heightened sentence (if one, in fact, is imposed) as a fact that demands such a sentence. Consequently, Washington's permissive exceptional sentence system implicates *Apprendi* just as surely as a mandatory enhancement system would.

(b) It is irrelevant that sentencing courts must determine whether the facts they find constitute a "substantial and compelling reason" to impose a heightened sentence.

The State and the United States also appear to assert that Washington's exceptional sentence system is exempt from *Apprendi* because it involves "qualitative judgments" in the sense that courts must decide for themselves whether certain fact patterns satisfy the Sentencing Reform Act's "substantial and compelling reason" standard. Resp. Br. at 23; United States Br. at 18-19. This suggestion, too, misunderstands the *Apprendi* doctrine.

The requirement that courts decide whether a proffered aggravating fact is a "substantial and compelling reason" to increase a defendant's sentence – that is, whether a proffered fact constitutes a statutorily enumerated aggravator or an "analogous" unenumerated one – is an utterly ordinary legal directive. In order to find the "substantial and compelling reason" standard satisfied, a court must first find certain facts, and then it must conclude that those facts meet the statutory classification. The first inquiry might be characterized as quantitative and the second might be called qualitative. But more precisely, one would simply say, as the Washington Supreme Court has, that "the determination of the underlying facts" supporting an exceptional sentence "is a question of fact, whereas the determination of whether those facts justify an exceptional sentence is a question of law." *Cardenas*, 129 Wn.2d at 6 n.7.

Petitioner readily agrees with the United States that the latter, legal question is beyond the purview of *Apprendi*. At the same time, however, there should be no doubt that the former, factual question *is* covered by *Apprendi*. *See Apprendi*, 530 U.S. at 482-83 (rule applies to "the determination of *a fact* that, if found, exposes the criminal defendant to a penalty exceeding the [otherwise-applicable] maximum") (emphasis altered); *id.* at 490 (rule applies to "any *fact*," other than a prior conviction, "that increases the penalty for a crime beyond the prescribed statutory maximum") (emphasis added).

It makes no difference whether Washington judges used to assess these kinds of factual issues under the State's former, indeterminate sentencing system. *Compare* United States Br. at 20. Nor does it matter whether Washington judges have extensive "legal training, professional discipline, and

institutional knowledge" in this regard. *Compare* Amicus Br. of Alabama, et al., at 16. The Framers unequivocally provided in Sixth Amendment that "[i]f the defendant prefer[s] the common sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of a single judge" with respect to a factual finding that would expose him to heightened punishment, "he [is] to have it." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

That is all Petitioner submits here. He does not contend that a jury should determine the legal definition of committing domestic violence with "deliberate cruelty." But he does maintain that Washington's Sentencing Reform Act violates *Apprendi* because it deprives him of the ability to contest before a jury whether there are underlying facts here to fulfill that definition.

III. Applying *Apprendi* Here Would Not Threaten Structured Sentencing Systems.

The State and some of its *amici* warn that if this Court holds that *Apprendi* applies to Washington's structured sentencing system, "legislatures would be forced to abandon guidelines as a sentencing option." United States Br. at 33; *see also* Resp. Br. at 36-37; Amicus Br. of Alabama, et al., at 15-19. Of course, neither an interest in legal innovation nor practical "efficien[cy]" can override the Sixth Amendment's command that a jury must find "all the facts which must exist in order to subject the defendant to a legally prescribed punishment." *Apprendi*, 530 U.S. at 498-99 (Scalia, J., concurring). But even if such concerns did factor into the constitutional equation here, recent experience and common sense reveal that the State's dire predictions lack any foundation.

A. Washington's Sentencing Reform Act Could Conform to *Apprendi* by Making Modest Statutory Changes.

The State and its *amici* vastly overstate the effect that applying *Apprendi* here would have on structured sentencing systems such as Washington's. This Court's decision here will not limit states' ability to create "standard sentencing ranges" in a grid or otherwise. Nor will it affect states' ability to allow judges to depart downward from those ranges based on mitigating facts (however found) or even to impose heightened sentences based on aggravating facts. The only portion of such systems at issue here is the *procedure* for finding aggravating facts. Accordingly, to the extent that states value "transparency and regularity" in sentencing, Amicus Br. of Alabama, et al., at 16, and to the extent states believe that those values are best served through structured sentencing, they will remain free to pursue those ends through guideline systems no matter what happens in this case.

Even as to the procedures for finding aggravating facts, recent experience shows that applying *Apprendi* here requires only modest statutory adjustments. States could follow Kansas' lead, for instance, and simply provide that a jury must find aggravating facts beyond a reasonable doubt. *See* Amicus Br. of Kansas Appellate Defender Office at 6-8.[7] Then, if a jury finds an aggravator, states could still leave the decision to the judge whether to impose an enhanced sentence or to keep the defendant's punishment in the standard range. *Id.* Such a

---

[7] Contrary to the Criminal Justice Legal Foundation's assertion, this solution does not "skew" guidelines or cause a problem regarding "symmetry." CJLF Amicus Br. at 7-9. The protections in the Sixth Amendment and the Due Process Clause are meant to make it harder to deprive an individual of his liberty than to confer mercy upon him. "Core concerns animating [*Apprendi*'s] jury and burden-of-proof requirements are thus absent" when judges reduce sentences based on mitigating facts. *Apprendi*, 530 U.S. at 490 n.16.

system does exactly what the State's *amici* purport to desire: it "requires juries to set the upper limit of a convict's sentence, so as to prevent erosion of the essential liberty in the [Fourteenth] and Sixth Amendments, but [does] not prevent legislatures from designing sentencing processes that blend the aptitudes of judge and jury." Amicus Br. of Alabama, et al., at 16.

Alternatively, states could treat statutory standard sentencing ranges "as suggestions that the judge may look to for guidance, but which are nonbinding" irrespective of what facts beyond the elements of the crime might be present. Christina N. Davilas, *Prosecutorial Sentence Appeals: Reviving the Forgotten Doctrine in State Law as an Alternative to Mandatory Sentencing Laws,* 87 Cornell L. Rev. 1259, 1274 & n.101 (2002); *see also* Richard S. Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines,* 44 St. Louis U. L.J. 425, 428 (2000) (describing these "voluntary" guideline systems). Seven states already follow this course, *id.*, and it appears still to be "effective" in reducing sentencing disparity. Frase, 44 St. Louis U. L.J. at 436. At the same time, this approach preserves limited judicial discretion by regarding guidelines as just that – guidelines – and not rigid directives.

B. Washington Could Conform to *Apprendi* Without Any Significant Practical Difficulties.

Although the State suggests it would be impractical to require aggravating facts to be proved to a jury beyond a reasonable doubt, it exaggerates the burdens that this step would involve. The State correctly notes that in 2002 Washington courts imposed exceptional sentences upward in 2.26% (628 / 27,835) of adult felony cases. Resp. Br. at 39. But the State neglects to add that fully 93.6% of those heightened sentences were imposed because (i) the defendant "agreed" to the facts underlying the sentence (defendants often do this in exchange for the State dropping additional charges)

or (ii) because the sentence "was the result of a plea agreement in exchange for a reduced charge" regarding the crime of conviction. *2002 Statistical Summary, supra,* at 44. This means that there were contested proceedings resulting in a court's finding aggravating facts in at most *41 cases* in 2002.[8]

Requiring that the procedures for finding aggravating facts in contested cases abide by *Apprendi* would not significantly affect these statistics. Parties still would be able to negotiate agreed sentences, and they still would have an incentive to do so in the vast majority of cases. Of course, since the State would have to prove any disputed aggravators to a jury beyond a reasonable doubt, a fraction more of criminal defendants may actually contest accusations in this regard. But that is as it should be. The guiding principle of the *Winship* rule is that "[t]he genius of our criminal law is violated when punishment is enhanced in the face of reasonable doubt as to the facts leading to the enhancement." *People v. Reese,* 258 N.Y. 89, 101 (1932) (Cardozo, J.). If a defendant in Washington wishes to challenge the State's accusation that he committed an aggravated crime, he should enjoy the same procedural safeguards against an erroneous judgment with respect to the proposed aggravator as with respect to any other element of the crime. *Apprendi,* 530 U.S. at 476.

Indeed, as the ACLU notes, Washington is already "well equipped" to follow such sentencing rules. ACLU Amicus Br. at 17. Washington already provides that a jury must find beyond a reasonable doubt the facts supporting "sentence enhancements" for actions such as using a deadly weapon. *See* Wash. Rev. Code §§ 9.94A.125 & 9.94A.310(4) (deadly

---

[8] One chart in the *2002 Statistical Summary* indicates that there were 628 exceptional sentences upward in 2002; another indicates that there were 645 such sentences. *Compare id.* at 24 *with id.* at 44. Defendants agreed to exceptional sentences upward in 604 cases, *id.* at 44, leaving at most 41 cases in which contested proceedings resulted in a court's finding aggravating facts.

weapon); Wash. Rev. Code § 9.94A.310(5)-(7) (drug offense in a "school zone"; selling drugs to a minor; criminal activity in correctional facility); *State v. Nass,* 76 Wn.2d 368, 370, 456 P.2d 347 (1969). These enhancements have exactly the same effect on a defendant's sentence as finding an aggravating fact does – namely, they authorize punishment above the otherwise applicable standard statutory range but still within the ultimate caps laid out in Wash. Rev. Code § 9A.20.021(1). *See, e.g.,* Wash. Rev. Code § 9.94A.310(4)(g).

In 2002, Washington courts imposed sentences incorporating enhancements for the use of a deadly weapon in 411 cases – a number that is about two-thirds as large as the total number of exceptional sentences upward imposed for *any* reason. *2002 Statistical Summary, supra,* at 20-21. There is no evidence that the procedures governing these weapon findings imposed any undue strain on Washington's criminal justice system. The plea in this case, in fact, included a deadly weapon finding, and the State does not suggest that this inclusion presented any practical difficulty. J.A. 7, 27 ¶ 2.3. Accordingly, the State cannot credibly argue that it "would not be manageable," Resp. Br. at 40, to require Washington courts, like Kansas courts, to find aggravating facts in the same manner that they already find other "sentence enhancers."

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Washington Court of Appeals and hold that the procedures in Washington's Sentencing Reform Act for finding the aggravating facts necessary to impose Petitioner's exceptional sentence upward are unconstitutional.

Respectfully submitted,

JEFFREY L. FISHER
Counsel of Record
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150

February 25, 2004

Attorneys for Petitioner

Supreme Court, U.S
FILED
DEC 4 - 2003
OFFICE OF THE CLERK

No. 02-1632

IN THE
Supreme Court of the United States

RALPH HOWARD BLAKELY, JR.,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

On Writ of Certiorari to the Washington State Court of Appeals, Division III

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

Adam N. Steinman
Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101
(206) 359-8000

Sheryl Gordon McCloud
Washington Association of
Criminal Defense Lawyers
1301 Fifth Avenue, Suite 3401
Seattle, WA 98101
(206) 224-8777

David M. Porter
Counsel of Record
National Association of
Criminal Defense Lawyers
1150 18th Street, N.W.
Suite 950
Washington, DC 20036
(202) 872-8600

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. *Apprendi* Requires that Any Fact Necessary for a Sentence in Excess of a Statutory Standard Sentencing Range Must be Proven to a Jury Beyond a Reasonable Doubt. 3

II. The Washington Courts' View Of *Apprendi* is Wrong and, if Accepted, Would Render *Apprendi* Meaningless. 8

III. The Constitutional Principles Underlying *Apprendi* Require that *Apprendi* Apply in this Context. 12

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Apprendi v. New Jersey, 530 U.S. 466 (2000) .....passim

In re Winship, 397 U.S. 358 (1970) 12

McMillan v. Pennsylvania, 477 U.S. 79 (1986) 8, 11

Mullaney v. Wilbur, 421 U.S. 684 (1975) 12, 13

Ring v. Arizona, 536 U.S. 584 (2002) .....passim

Specht v. Patterson, 386 U.S. 605 (1967) 12

State v. Blakely, 111 Wash. App. 851, 47 P.3d 149 (2002), *review denied*, 62 P.3d 889, *cert. granted*, 124 S. Ct. 429 (2003) 8

State v. Buchanan, 110 Wash. App. 1031, 2002 Wash. App. LEXIS 293 (Feb. 15, 2002), *review denied*, 53 P.3d 1008 (2002), *cert. denied*, 123 S. Ct. 1266 (2003).....8

State v. Gore, 143 Wash. 2d 288, 21 P.3d 262 (2001) ..passim

State v. Gould, 23 P.3d 801 (Kan. 2001).....7

State v. Ramires, 109 Wash. App. 749, 37 P.3d 343, *review denied*, 52 P.3d 521 (2002) 8

State v. Sanchez, 69 Wash. App. 195, 848 P.2d 735 (1993) 14

State v. Taylor, 111 Wash. App. 519, 45 P.3d 1112 (2002), *review denied*, 60 P.3d 1212 (2003).....8

State v. Urlacher, 111 Wash. App. 1020, 2002 Wash. App. LEXIS 739 (Apr. 26, 2002), *review denied*, 60 P.3d 92 (2002) 8

United States v. Cotton, 535 U.S. 625 (2002).....1

Statutes

Wash. Rev. Code § 9.94A.120 (2000) 3, 5, 10, 11

Wash. Rev. Code § 9.94A.310 (2000) 7

Wash. Rev. Code § 9.94A.370 (2000) 4, 7

Wash. Rev. Code § 9.94A.390 (2000) 4, 14, 15

Wash. Rev. Code § 9.94A.505 (2002) 3

Wash. Rev. Code § 9.94A.535 (2002) 3, 14, 15

Wash. Rev. Code § 9A.20.021 (2000) 9, 10

INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors.[1] Among the NACDL's objectives are to promote the proper administration of justice and to ensure that findings that impact the length of criminal sentences are made according to constitutionally required procedures.

The Washington Association of Criminal Defense Lawyers (WACDL) is a non-profit corporation organized in 1987, and it has 730 criminal defense lawyer members in the State of Washington. It is a state affiliate of NACDL, and it shares its mission on behalf of criminal defense lawyers in the State of Washington.

The NACDL has appeared as *amicus curiae* in this Court on numerous occasions, including *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and cases applying *Apprendi*. *See, e.g.*, *United States v. Cotton*, 535 U.S. 625 (2002). Because the decision below is contrary to the rule set forth by this Court in *Apprendi*, the NACDL and the WACDL respectfully submit this brief *amici curiae* in support of Petitioner.

---

[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amici curiae* state that no counsel for a party authored any part of this brief, and no person or entity, other than *amici curiae*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Where a state sentencing scheme requires the existence of aggravating factors in order to impose a sentence in excess of statutorily imposed sentencing guidelines, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), mandates that such factors be found by a jury beyond a reasonable doubt. Where, as here, these factors are found only by a judge under a preponderance of evidence standard, *Apprendi* does not allow a sentence in excess of the statutory guideline range.

Apprendi holds that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. The aggravating factors found in this case increased Petitioner's sentence beyond the maximum allowed by the statutory sentencing guidelines. Thus, these facts are precisely the sort that must be proven to a jury beyond a reasonable doubt. Imposing an exceptional sentence based solely on a ***judge's*** finding of aggravating factors under a ***preponderance*** standard contravenes *Apprendi*'s fundamental holding. This is of particular concern under Washington's system, where exceptional sentences may be based on separate, uncharged crimes that were never put to a jury or proven beyond a reasonable doubt.

The Washington courts mistakenly reason that *Apprendi* does not apply because another statutory provision limits the total sentence in the event a sentence in excess of the standard range is imposed. But to accept this logic would render *Apprendi* meaningless – a state could circumvent *Apprendi* entirely simply by enacting a statute providing that punishments for non-capital felonies may never exceed life imprisonment.

Accordingly, this Court should correct the Washington courts' mistaken application of *Apprendi*. This Court should adopt the reasoning of the Kansas Supreme Court, which correctly held that *Apprendi* required a jury finding beyond a reasonable doubt in order to impose a sentence in excess of a statutory standard sentencing range. The Kansas courts' approach is based on a straightforward application of *Apprendi*'s clear holding that facts necessary to impose a sentence in excess of the maximum sentence otherwise available must be found by a jury beyond a reasonable doubt.

ARGUMENT

I. *Apprendi* Requires that Any Fact Necessary for a Sentence in Excess of a Statutory Standard Sentencing Range Must be Proven to a Jury Beyond a Reasonable Doubt.

Under Washington's sentencing statute, the court must impose a sentence within the statutory guidelines range unless it finds that "aggravating factors" justify an exceptional sentence upward. *State v. Gore*, 143 Wash. 2d 288, 313, 21 P.3d 262 (2001); *see also* Wash. Rev. Code § 9.94A.120(1), (2) (2000) (providing that "the court ***shall*** impose a sentence within the sentence range for the offense" unless "it finds . . . substantial and compelling reasons justifying an exceptional sentence") (emphasis added).[2] The existence of such aggravating factors is precisely the kind of finding that must be made by a jury beyond a reasonable doubt under *Apprendi*. Washington law, however, allows

---

[2] Although Washington has recently recodified parts of its sentencing laws, the provisions governing exceptional sentences in excess of the statutory standard range remain the same. *See* Wash. Rev. Code §§ 9.94A.505(2)(a)(i), 9.94A.535 (2002).

such findings to be made by a judge, under a preponderance of the evidence standard. *See id.* § 9.94A.370(2) (2000).

In this case, the exceptional sentence was based on the aggravating factor of domestic violence committed with deliberate cruelty and within the sight or sound of the victim's minor child. *See* Wash. Rev. Code § 9.94A.390(2)(h)(ii), (iii) (2000).[3] This factor – and this factor alone – enabled the court to impose a sentence in excess of the statutory maximum set forth in Washington's sentencing guidelines. As a result, Petitioner received a 90-month sentence, more than ***three years*** longer than the maximum sentence allowed by the statutory standard range absent a finding of aggravating factors.

Under *Apprendi*, the facts underlying such a deviation from a statutory standard sentencing range must be found by a jury beyond a reasonable doubt:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. . . . It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

---

[3] The trial court also found "deliberate cruelty" to be an independent, additional aggravating factor, *see* Wash. Rev. Code § 9.94A.390(2)(a) (2000), but the appellate court affirmed only the domestic-violence-plus-deliberate-cruelty aggravator. *See* Pet. App. 16a-17a.

Apprendi, 530 U.S. at 490 (citations and quotation marks omitted).

Thus, *Apprendi* dictates that "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* at 494 (footnote omitted). The answer to that question in this case is an unequivocal yes. The court's finding of aggravating factors exposed Petitioner to a sentence greater than the statutory maximum sentence he would have faced absent such factors. These aggravating factors are what "increase[d] the prescribed range of penalties to which [Petitioner was] exposed." *Id.* at 490.

In *Ring v. Arizona*, 536 U.S. 584 (2002), this Court explained *Apprendi* as follows:

> If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt. A defendant may not be exposed to a penalty ***exceeding*** the maximum he would receive if punished according to the facts reflected in the jury verdict alone.

Id. at 602 (citing *Apprendi*, 530 U.S. at 482-83) (emphasis in original) (quotation marks omitted).

Washington's statutory sentencing scheme provides that "the court ***shall*** impose a sentence within the sentence range for the offense" unless aggravating factors exist. Wash. Rev. Code § 9.94A.120(1), (2) (2000) (emphasis added). Thus, imposing a sentence beyond the guideline range is "contingent on the finding" of such aggravating

factors and, under *Apprendi*, this finding must be made "by the jury beyond a reasonable doubt." *Ring*, 536 U.S. at 602.

This Court's application of this straightforward principle to the facts of *Apprendi* is instructive. Mr. Apprendi pled guilty to unlawful possession of a firearm, the sentencing range for which was 5 to 10 years. *See Apprendi*, 530 U.S. at 468. At sentencing, the state court found by a preponderance of the evidence that Apprendi's crime was racially motivated, and enhanced Apprendi's sentence under New Jersey's hate crime statute. *See id.* at 471. Based on this finding, the court sentenced Apprendi to a 12-year prison term. *Id.*

This Court held that the hate crime finding could not be the basis for enhancing Apprendi's sentence beyond the statutory maximum for his gun possession offense, where that finding had not been made by the jury beyond a reasonable doubt. It reasoned:

> New Jersey threatened Apprendi with certain pains if he unlawfully possessed a weapon and with additional pains if he selected his victims with a purpose to intimidate them because of their race. As a matter of simple justice, it seems obvious that the procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment. Merely using the label "sentence enhancement" to describe the latter surely does not provide a principled basis for treating them differently.

Id. at 476. Here, the State of Washington threatened Petitioner with certain pains (the statutory standard guidelines) for kidnapping a person. It threatened him with

additional pains (an exceptional sentence beyond the maximum allowed by those guidelines) for exercising deliberate cruelty in connection with domestic violence. Thus, as in *Apprendi*, a jury finding beyond a reasonable doubt is necessary to authorize a sentence beyond the maximum set forth in the statutory standard range.

The Kansas Supreme Court has already recognized that *Apprendi* applies to sentences in excess of statutorily imposed standard sentencing ranges. In *State v. Gould*, 23 P.3d 801 (Kan. 2001), the Kansas Supreme Court correctly held that *Apprendi* requires that the aggravating factors underlying such an enhanced sentence must be proven to a jury beyond a reasonable doubt. *See Gould*, 23 P.3d at 812-13.[4] The Kansas court reasoned that "[u]nder *Apprendi*, it does not matter how the required finding is labeled, but whether it exposes the defendant to a greater punishment than that authorized by the jury's verdict." *Id.* (citing *Apprendi*, 530 U.S. at 469, 490-96). Where the existence of aggravating factors has not been decided by a jury beyond a reasonable doubt, the only "authorized"

---

[4] The sentencing schemes in Washington and Kansas are structurally identical. Both contain a statutorily imposed sentencing grid that establishes presumptive sentencing ranges. *See* Wash. Rev. Code §§ 9.94A.310 & 370 (2000); *Gould*, 23 P.3d at 811. Both condition any upward departure from the standard range on a finding of one or more aggravating factors. *See* Wash. Rev. Code §§ 9.94A.120 (2000); *Gould*, 23 P.3d at 812 (citing Kan. Stat. Ann. § 21-4716(a)). Both provide that such aggravating factors must be substantial, compelling, and not already included in the elements of the underlying offense. *See Gore*, 143 Wash. 2d at 315-16; *Gould*, 23 P.3d at 812 (quoting Kan. Stat. Ann. § 21-4716(b)). And both provide additional statutory limits on the total sentence that may be imposed when the court departs from the standard guidelines range. *See* Wash. Rev. Code § 9A.20.021(1) (2000); *Gould*, 23 P.3d at 812.

sentence is the one set forth in the presumptive sentencing grid. *See id.* at 813. In that situation, the court violates *Apprendi* if it imposes a sentence "beyond the maximum sentence in the applicable grid box." *Id.*

II. The Washington Courts' View Of *Apprendi* is Wrong and, if Accepted, Would Render *Apprendi* Meaningless.

Washington courts, including the court below, have consistently rejected attempts to apply *Apprendi* to exceptional sentences in excess of the statutory standard range.[5] The two rationales relied on by Washington courts are fundamentally mistaken. First, the presence of a separate statutory provision that caps the size of any exceptional sentence for particular felonies does not somehow exempt such sentences from *Apprendi*'s mandate. Second, this Court's decision in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), does not apply where, as here, the sentence imposed is not authorized without the finding of an aggravating factor.

1. Washington state courts have erroneously concluded that *Apprendi* does not apply to exceptional sentences because a separate statutory provision limits the size of such a sentence for particular felonies. The leading

[5] *See Gore*, 143 Wash. 2d at 311-15; *State v. Taylor*, 111 Wash. App. 519, 524-25, 45 P.3d 1112 (2002), *review denied*, 60 P.3d 1212 (2003); *State v. Blakely*, 111 Wash. App. 851, 870-71, 47 P.3d 149 (2002), *review denied*, 62 P.3d 889, *cert. granted*, 124 S. Ct. 429 (2003); *State v. Urlacher*, 111 Wash. App. 1020, 2002 Wash. App. LEXIS 739 (Apr. 26, 2002), *review denied*, 60 P.3d 92 (2002); *State v. Buchanan*, 110 Wash. App. 1031, 2002 Wash. App. LEXIS 293 (Feb. 15, 2002), *review denied*, 53 P.3d 1008 (2002), *cert. denied*, 123 S. Ct. 1266 (2003); *State v. Ramires*, 109 Wash. App. 749, 37 P.3d 343, 353, *review denied*, 52 P.3d 521 (2002).

Washington Supreme Court case relies on the fact that a sentence in excess of the statutory guidelines may not result in a sentence greater than the ceilings imposed by Wash. Rev. Code § 9A.20.021 (2000) for each of three broad classes of felonies. *See Gore*, 143 Wash. 2d at 313-14. For Petitioner's Class B felony conviction, section 9A.20.021(1)(b) precludes the court from imposing an exceptional sentence of greater than 10 years.[6]

The mere fact that Washington law contemplates that some Class B felony convictions might result in a 10-year sentence does not preclude the application of *Apprendi* to sentences in excess of the statutory standard sentencing range. This Court rejected this logic in *Ring*, where the State made an identical argument in connection with Arizona's capital sentencing scheme. Because the Arizona statute "specifies 'death or life imprisonment' as the only sentencing options" for first degree murder, the State argued that the jury's first-degree murder conviction alone authorized the judge to sentence within this "range of punishment" up to and including the death penalty. *Ring*, 536 U.S. at 603-04 (citations omitted).

This Court concluded that *Apprendi* flatly precluded such reasoning:

> This argument overlooks *Apprendi*'s instruction that the relevant inquiry is one not of form, but of effect. In effect, the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict.

[6] For class A felonies, the sentence may not exceed life imprisonment; for class C felonies, the sentence may not exceed 5 years imprisonment. *See* Wash. Rev. Code § 9A.20.021(1)(a), (c) (2000).

> The Arizona first-degree murder statute authorizes a maximum penalty of death only in a formal sense, for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty. If Arizona prevailed on [this] argument, *Apprendi* would be reduced to a meaningless and formalistic rule of statutory drafting.

Id. at 604 (citations and quotation marks omitted).

Likewise, the Washington statute "authorizes a maximum penalty of [10 years] only in the formal sense." *Id.* In effect, Washington's sentencing scheme specifically requires a finding of aggravating factors in order to depart upward from the statutory sentencing guidelines. *See* Wash. Rev. Code § 9.94A.120(1), (2) (2000).

To accept the logic employed by the Washington courts would truly render *Apprendi* "a meaningless and formalistic rule of statutory drafting." *Ring*, 536 U.S. at 604. Under that approach, a sentence in excess of the otherwise mandatory sentencing range is exempt from *Apprendi* as long as it does not exceed the other, general "statutory maximums" imposed by Wash. Rev. Code § 9A.20.021 (2000) for each of three broad classes of felonies. *See Gore*, 143 Wash. 2d at 313-14. But if that is the case, then a state could avoid *Apprendi* entirely simply by enacting a statute providing that punishments for non-capital felonies may never exceed life imprisonment. In that scenario, ***any*** prison sentence would be within this second "statutory maximum" and, therefore, exempt from *Apprendi*.

Apprendi does not and cannot condone such an absurd result. Rather, "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding

of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Ring*, 536 U.S. at 602 (citing *Apprendi*, 530 U.S. at 482-83). Washington law expressly provides that Petitioner's sentence in excess of the statutory guideline range was contingent on the finding of aggravating circumstances. *See* Wash. Rev. Code § 9.94A.120(1), (2) (2000); *Gore*, 143 Wash. 2d at 313. Thus, those circumstances must be found by a jury beyond a reasonable doubt.

2. Washington courts' reliance on *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), is misplaced. In *Gore*, the Washington Supreme Court concluded that "the factual determinations that support reasons for exceptional sentences upward fall within the *McMillan* type of case and not the *Apprendi* type" because "[a]ggravating factors neither increase the maximum sentence nor define a separate offense calling for a separate penalty." *Gore*, 143 Wash. 2d at 314.

Contrary to the Washington Supreme Court's reasoning, *McMillan* does not justify refusing to apply *Apprendi* to sentences in excess of statutory standard sentencing ranges. The Washington courts' reliance on *McMillan* is premised on the same formalistic approach that *Apprendi* and *Ring* have explicitly rejected. The aggravating factors upon which an exceptional sentence is based ***do*** "increase the maximum sentence," because without such factors the high end of the standard sentencing range is the highest sentence that may be imposed. As in *Ring*, the conviction of the base offense authorizes a higher sentence "only in a formal sense," because the statute "requir[es] the finding of an aggravating circumstance" before a higher sentence may be imposed. *Ring*, 536 U.S. at 604.

As *Apprendi* expressly recognized, *McMillan* is limited to "cases that do not involve the imposition of a sentence more severe than the statutory maximum for the

offense established by the jury's verdict." *Apprendi*, 530 U.S. at 487 n.13. Here, absent aggravating factors, Petitioner's statutory maximum was the top of the sentencing guidelines range (53 months). Because the court imposed a sentence of 90 months, this case does "involve the imposition of a sentence more severe than the statutory maximum established by the jury verdict." *Id.* Thus *Apprendi* requires those aggravating factors to be proven to a jury beyond a reasonable doubt. *McMillan* does not exempt those factors from *Apprendi*'s mandate.

III. The Constitutional Principles Underlying *Apprendi* Require that *Apprendi* Apply in this Context.

The rule set forth in *Apprendi* – that a fact that increases the penalty for a crime beyond the prescribed statutory maximum must be treated as an element of the offense – is necessary to enforce basic constitutional protections for criminal defendants, including proof beyond a reasonable doubt and trial by jury. *See Specht v. Patterson*, 386 U.S. 605 (1967); *In re Winship*, 397 U.S. 358 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975). In *Mullaney*, this Court made clear that if these protections are to mean anything, they must be such that they cannot be evaded by mere changes in form:

> [I]f *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.

421 U.S. at 698.

The need to prevent states from evading basic constitutional protections simply by manipulating what facts were defined as "elements" of an offense was at the heart of this Court's mandate in *Apprendi* that "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494 (footnote omitted). *Apprendi* based this straightforward rule on the core principle set forth in *Mullaney* that facts resulting in increased culpability and consequences for a criminal defendant cannot be relegated to a lesser array of procedural protections:

> [*Mullaney*] acknowledged that criminal law "is concerned not only with guilt or innocence in the abstract, but also with the degree of criminal culpability" assessed. Because the "*consequences*" of a guilty verdict for murder and for manslaughter differed substantially, we dismissed the possibility that a State could circumvent the protections of *Winship* merely by "redefining the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment."

Id. at 485 (emphasis in original) (quoting *Mullaney*, 421 U.S. at 697-98 & n.12).

Here, the findings made by the judge at sentencing resulted in substantially more serious consequences for the Petitioner. The judge's conclusion that, by a preponderance of the evidence, Petitioner acted with deliberate cruelty and within the sight or sound of the victim's minor child resulted in a sentence more than ***three years*** longer than the four-and-a-half-year sentence that was authorized absent such

aggravating factors. This is a more severe enhancement than the one that this Court found unconstitutional in *Apprendi*, where the sentence imposed was only two years longer than the ten-year sentence that was authorized without the hate-crime enhancement. *See Apprendi*, 530 U.S. at 468, 471.

The fact that Washington's system deprives defendants of basic constitutional protections is of particular concern where, as here, the findings involve the defendant's *mens rea* – a core component of criminal culpability. The court's finding of deliberate cruelty is a paradigmatic determination of defendants' *mens rea*. As this Court recognized in *Apprendi*, "[t]he defendant's intent in committing a crime is perhaps as close as one might come to a core criminal offense 'element.'" 530 U.S. at 493. Indeed, all nine Members of this Court in *Apprendi* agreed, at least implicitly, that if racial animus were a *mens rea* instead of a motive, then that fact would have to be proved beyond a reasonable doubt to a jury. See *Apprendi*, 530 U.S. at 492 (opinion of the Court); *accord id.* at 553 (O'Connor, J., dissenting).

Under Washington law, the danger of permitting sentences in excess of the standard sentencing range based on findings made by a judge under a mere preponderance standard is especially acute. Uncharged crimes, distinct from the crime for which a defendant has been properly convicted, may be the basis for imposing an exceptional sentence upward in Washington. *See* Wash. Rev. Code § 9.94A.390 (2000); Wash. Rev. Code § 9.94A.535 (2002); *see also State v. Sanchez*, 69 Wash. App. 195, 205, 848 P.2d 735 (1993) (noting that Washington law "contemplates the imposition of an exceptional sentence based, at least in part, upon acts for which the defendant might have been criminally charged").[7]

[7] For example, Washington law explicitly allows for sentences in excess of the statutory standard range if "[t]he offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time," Wash. Rev. Code § 9.94A.390(2)(g) (2000); Wash. Rev. Code § 9.94A.535(2)(g) (2002), or if "[t]he current offense involved domestic violence . . . and . . . was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time." Wash. Rev. Code § 9.94A.390(2)(h)(i) (2000); Wash. Rev. Code § 9.94A.535(2)(h)(i) (2002). Moreover, the aggravating factors listed in the relevant statute "are illustrative only and are not intended to be exclusive reasons for exceptional sentences." Wash. Rev. Code § 9.94A.390 (2000); Wash. Rev. Code § 9.94A.535 (2002).

In that circumstance, it is the judge's finding of another crime that allows it to impose a sentence more severe than what is authorized under the facts based solely on the facts established. Thus, failing to apply *Apprendi* to exceptional sentences upward creates a situation where a defendant may be punished for a crime that no jury has considered – much less delivered a verdict of conviction – and for which the *Winship* reasonable doubt standard has not and cannot be met.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the court below and hold that *Apprendi* applies to sentences in excess of statutory standard sentencing ranges, where such exceptional sentences are expressly conditioned on the finding of aggravating factors.

Respectfully submitted,

David M. Porter
Counsel of Record
National Association of
Criminal Defense Lawyers
1150 18th Street, N.W., Suite 950
Washington, DC 20036
(202) 872-8600

Adam N. Steinman
Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101
(206) 359-8000

Sheryl Gordon McCloud
Washington Association of
Criminal Defense Lawyers
1301 Fifth Avenue, Suite 3401
Seattle, WA 98101
(206) 224-8777

December 4, 2003

13D

Supreme Court, U.S.
FILED
DEC 4 - 2003
OFFICE OF THE CLERK

No. 02-1632

IN THE SUPREME COURT OF THE UNITED STATES

RALPH HOWARD BLAKELY, JR.
Petitioner,

v.

STATE OF WASHINGTON
Respondent.

On Writ of Certiorari to the
Washington Court of Appeals, Division III

BRIEF OF KANSAS APPELLATE DEFENDER OFFICE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

RANDALL L. HODGKINSON*
DEPUTY APPELLATE DEFENDER
700 Jackson, Suite 900
Topeka, KS 66603
(785) 296-5484
Attorney for Amicus

*Counsel of Record

QUESTION PRESENTED

Whether a fact (other than a prior conviction) necessary for an upward departure from a statutory standard sentencing range must be proved according to the procedures mandated by *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

TABLE OF CONTENTS

Interest of Amicus Curiae 1

Summary of Argument 2

Argument 3

Conclusion 8

TABLE OF AUTHORITIES

Cases

Apprendi v. New Jersey, 530 U.S. 466 (2000) .... ii, 2, 4-8

Jones v. United States, 526 U.S. 227 (1999) 4

Ring v. Arizona, 536 U.S. 584 (2002) 5-6

State v. Gould, 23 P.3d 801 (Kan. 2001) 1, 2, 5-7

State v. Richardson, 901 P.2d 1 (Kan. App. 1995) 3

State v. Spain, 953 P.2d 1004 (Kan. 1998) 4

Constitutional Provisions

Sixth Amendment 2

Fourteenth Amendment 2

Statutes

K.S.A. 21-4702 (1995) 3

K.S.A. 21-4704 (1995) 3, 4

K.S.A. 21-4705 (1995) 3

K.S.A. 2002 Supp. 21-4716 ..... 3, 4, 6

K.S.A. 2002 Supp. 21-4718 7

INTEREST OF AMICUS CURIAE[1]

The Kansas Appellate Defender Office is a unit of the Kansas Board of Indigent Defense Services and is responsible for representing persons convicted of felonies on direct appeal in state court. The Kansas Appellate Defender Office was counsel of record in *State v. Gould*, 23 P.3d 801 (Kan. 2001), which is a case that dealt with an issue quite similar to that raised by petitioner in this case. As a result, many of amicus' clients have an interest in the outcome of this case. Amicus is also in a position to relate to the Court the state legislative response to the *Gould* decision.

---

[1]Letters of consent have been filed with the Clerk. No counsel for a party authored any part of this brief, and no person made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

In *State v. Gould*, 23 P.3d 801 (Kan. 2001), the Kansas Supreme Court correctly held that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), compelled the conclusion that a statutory procedure that exposes a defendant to a greater punishment based on facts other than those authorized by the jury's verdict violated the Sixth and Fourteenth Amendments. And, despite predictions of some extreme legislative responses, the Kansas Legislature has not attempted to "end-run" around *Apprendi* and *Gould*. The Kansas Legislature amended the existing sentencing guidelines so that enhanced sentences can be imposed in conformity with this Court's pronouncement in *Apprendi*.

ARGUMENT

The Kansas Sentencing Guidelines Act

In 1993, the Kansas Legislature enacted the Kansas Sentencing Guidelines Act ("KSGA"). *See* K.S.A. 21-4701 to -4728 (1995).[2] The Legislature expressly indicated its intent that these "sentencing guidelines and prosecuting standards ... shall apply equally to all offenders in all parts of the state, without discrimination as to any element that does not relate to the crime or the previous criminal record of the defendant." K.S.A. 21-4702.

The KSGA consists of two sentencing grids, one for drug felonies and one for nondrug felonies. K.S.A. 21-4704, -4705. The determination of a sentencing range is based upon the intersection of two factors on a sentencing grid: the statutorily-defined severity level of the crime of conviction and the offender's prior criminal history. Each grid box sets out a relatively narrow range of months, which is the authorized sentence of imprisonment for that offense. Unless aggravating or mitigating factors are proved, the sentencing court is required to pronounce a sentence within that grid box. *See* K.S.A. 21-4704, -4705, -4716. In form, the KSGA appears to operate identically to the Washington Sentencing Reform Act, which is the subject of this writ. *See State v. Richardson*, 901 P.2d 1, 4 (Kan. App. 1995) (Kansas Legislature relied on Washington, Oregon, and Minnesota guidelines when formulating KSGA).

---

[2]For a thorough exposition of the KSGA, *see* Kansas Sentencing Commission, 2003 Kansas Sentencing Guidelines Desk Reference Manual, which can be accessed at: http://www.accesskansas.org/ksc/2003DeskRef.htm

Prior to 2001, the KSGA provided that the sentencing court could depart upward to increase the length of a sentence up to a maximum of twice the highest number in a grid box if it found one or more aggravating factors. K.S.A. 21-4716. Prior to 2001, the statute was silent as to the standard of proof, although the Kansas Supreme Court had indicated that the facts "established for use in sentencing require less evidentiary weight than facts asserted for conviction." *State v. Spain*, 953 P.2d 1004, 1009-10 (Kan. 1998).

State v. Gould

Crystal Gould was convicted of three counts of child abuse, each a severity level 5 nondrug offense. Ms. Gould did not have any criminal history, so she fell into the lowest criminal history category of "I". Using the nondrug grid, the sentencing range for each count was 31 to 34 months. *See* K.S.A. 21-4704. But the state moved for an upward departure and the sentencing court found three aggravating factors: (1) that the victims were particularly vulnerable due to age, (2) that the offender's conduct manifested excessive brutality in a manner not normally present in that offense, and (3) that the offense involved a fiduciary relationship between the victims and the offender. As a result of these findings, the sentencing court imposed a 68-month prison sentence for each of the first two counts and ran those sentences consecutive.

While Ms. Gould's case was on direct appeal to the Kansas Court of Appeals, this Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Ms. Gould had already challenged her sentence based on this Court's holding in *Jones v. United States*, 526 U.S. 227 (1999). After the *Apprendi* decision, Ms. Gould's appeal was transferred to the Kansas Supreme Court

and both parties filed supplemental briefs concerning the impact of *Apprendi*.

In its decision in *Gould*, the Kansas Supreme Court acknowledged that this Court had expressed the following guarantee in *Apprendi*: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *State v. Gould*, 23 P.3d 801, 810 (Kan. 2001) (quoting 530 U.S. at 490).

The state argued that, with regard to the KSGA, the "prescribed statutory maximum" was twice the maximum sentence set out in the appropriate grid box and, therefore, Ms. Gould's exceptional sentence was not affected by *Apprendi*. The Kansas Supreme Court disagreed:

> Under *Apprendi*, it does not matter how the required finding is labeled, but whether it exposes the defendant to a greater punishment than that authorized by the jury's verdict. Gould's jury verdict "authorized" a sentence of 31 to 34 months for each child abuse conviction. By imposing two 68-month sentences, the district court went beyond the maximum sentence in the applicable grid box and exposed Gould to punishment greater than that authorized by the jury's verdict. [23 P.3d at 812-13 (citing 530 U.S. at 469, 490-96)].

The Kansas Supreme Court correctly followed this Court's teaching that "the relevant inquiry is one not of form, but of effect–does the required finding expose the defendant to a

greater punishment than that authorized by the jury's guilty verdict." 23 P.3d at 813 (quoting 530 U.S. at 494). *See also Ring v. Arizona*, 536 U.S. 584, 607 (2002)(Arizona capital sentencing scheme unconstitutional because it allows judge–not jury–to find aggravating factor necessary to impose death penalty; noting that there is "no reason to differentiate capital crimes from all others in this regard").

Because the sentenced imposed on Ms. Gould exceeded that authorized by the jury's guilty verdict, the Kansas Supreme Court reversed her sentence and remanded for resentencing.

Legislative reaction to Gould.

In response to the instant petition, the State of Washington predicts that if this Court agrees with Petitioner's position, "it would encourage the legislature to write out standard ranges." Br. in Opp. at 22. And in *Apprendi*, dissenting members of this Court expressed concern that a state might make an "end-run" around its pronouncement by simply increasing all maximum sentences. 530 U.S. at 541 (O'Connor, J., dissenting). Kansas provides an example of legislative reaction to *Apprendi* where those concerns were not realized.

The *Gould* decision was issued in May 2001. In its next legislative session, the Kansas Legislature simply adopted this Court's standard and set up a procedure whereby this Court's standard could be applied to state requests for upward durational departure sentences:

> Subject to the provisions of subsection (b) of K.S.A. 21-4718, and amendments thereto, any fact that would increase the penalty for a crime beyond the statutory maximum, other than a prior conviction, shall be submitted to a jury and proved beyond a reasonable doubt. [K.S.A. 2002 Supp. 21-4716(b)].
>
> . . . .
>
> Upon motion of the county or district attorney to seek an upward durational departure sentence, the court shall consider imposition of such upward durational departure sentence in the manner provided in subsection (b)(2). The county or district attorney shall file such motion to seek an upward durational departure sentence not less than 30 days prior to the date of trial or if the trial date is to take place in less than 30 days then within five days from the date of the arraignment. [K.S.A. 2002 Supp. 21-4718(b)(1).]

K.S.A. 2002 Supp. 21-4718(b) then goes on to set out procedures, evidentiary rules, and unanimity standards for the jury consideration of aggravating factors, and includes provisions for waiver of a jury trial on such matters.

After *Apprendi* and *Gould*, both the standard sentencing ranges found in the KSGA and the legislative intent to promote uniformity and standardize sentences, while allowing for exceptional cases, remain intact. The crux of the *Apprendi* decision turned on who determined the critical facts and by what standard. The Kansas Legislature has not attempted an "end-run" around *Apprendi*, but has simply modified the KSGA to effect the guarantees explained in *Apprendi*.

CONCLUSION

By conducting its analysis "not of form, but of effect," the Kansas Supreme Court correctly applied this Court's pronouncement in *Apprendi* to a statutory sentencing scheme that purported to allow increased sentences greater than those authorized by the jury's verdict. And, from a practical standpoint, the Kansas Legislature has simply enacted the very guarantees explained by this Court in *Apprendi*. To the extent that the sentencing schemes in Kansas and Washington are the same for purposes of the instant writ, amicus urges this Court to reverse the decision of the Washington Court of Appeals.

Respectfully submitted,

RANDALL L. HODGKINSON*
DEPUTY APPELLATE DEFENDER
700 Jackson, Suite 900
Topeka, KS 66603
(785) 296-5484

Attorney for Amicus

*Counsel of Record

December 4, 2003

(12)

Supreme Court, U.S.
FILED
JAN 22 2004
OFFICE OF THE CLERK

No. 02-1632

IN THE

Supreme Court of the United States

RALPH HOWARD BLAKELY, JR.,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent.

On Writ of Certiorari to the Washington Court of Appeals, Division III

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
Counsel of Record
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorney for Amicus Curiae Criminal Justice Legal Foundation

QUESTIONS PRESENTED

This case involves a system of guided discretion in sentencing, implemented through sentencing guidelines. The judge has discretion to depart upward or downward from the standard sentence based on any aggravating or mitigating factors not accounted for in the definition of the offense or calculation of the standard sentence. The case presents in following questions:

1. In such a system, does the rule of *Apprendi* v. *New Jersey* require that the facts used to justify an upward departure be treated as elements of an offense, *i.e.*, found by the jury and proven beyond a reasonable doubt?

2. Does the answer to Question 1 depend on whether the standard range is established by the legislature directly by statute or indirectly through a sentencing commission?

TABLE OF CONTENTS

Questions presented i

Table of authorities iv

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 3

Argument 4

I

Sentencing reform through structured discretion should not be penalized with additional constitutional restrictions 4

II

There is no basis for distinguishing the Washington system from the federal system for Sixth Amendment purposes 10

III

The relevant "range," for purposes of *Apprendi*, is the range set by statute for Class B felonies 12

Conclusion 15

TABLE OF AUTHORITIES

Cases

Apprendi v. New Jersey, 530 U. S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000) 5, 10, 11, 12, 14

Dennis v. United States, 339 U. S. 162, 94 L. Ed. 734, 70 S. Ct. 519 (1950) 5

Edwards v. United States, 523 U. S. 511, 140 L. Ed. 2d 703, 118 S. Ct. 1475 (1998) 8

Furman v. Georgia, 408 U. S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972) 6

Hewitt v. Helms, 459 U. S. 460, 74 L. Ed. 2d 675, 103 S. Ct. 864 (1983) 9

Koon v. United States, 518 U. S. 81, 135 L. Ed. 2d 392, 116 S. Ct. 2035 (1996) 5, 6, 7

Loving v. United States, 517 U. S. 748, 135 L. Ed. 2d 36, 116 S. Ct. 1737 (1996) 11

Mistretta v. United States, 488 U. S. 361, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989) 5, 6

Mitchell v. United States, 526 U. S. 314, 143 L. Ed. 2d 424, 119 S. Ct. 1307 (1999) 7

Payne v. Tennessee, 501 U. S. 808, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991) 8

Ring v. Arizona, 536 U. S. 584, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002) 10, 11, 13

Sandin v. Conner, 515 U. S. 472, 132 L. Ed. 2d 418, 115 S. Ct. 2293 (1995) 9

Sawyer v. Whitley, 505 U. S. 333, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992) 6

Shafer v. South Carolina, 532 U. S. 36, 149 L. Ed. 2d 178, 121 S. Ct. 1263 (2001) 13

State v. Blakely, 111 Wash. App. 851, 47 P. 3d 149 (2002) 3

State v. Gore, 143 Wash. 2d 288, 21 P. 3d 262 (2001) 3

Tuilaepa v. California, 512 U. S. 967, 129 L. Ed. 2d 750, 114 S. Ct. 2630 (1994) 13

United States v. Banks, 540 U. S. __ (No. 02-473, Dec. 2, 2003) 8

United States v. Watts, 519 U. S. 148, 136 L. Ed. 2d 554, 117 S. Ct. 633 (1997) 7, 8

Williams v. New York, 337 U. S. 241, 93 L. Ed. 1337, 69 S. Ct. 1079 (1949) 6

Woodson v. North Carolina, 428 U. S. 280, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976) 6

United States Statutes

Pub. L. 108-21, 117 Stat. 650 8

State Statutes

Former Wash. Rev. Code § 9.94A.120(2) 13

Former Wash. Rev. Code § 9.94A.390 13

Wash. Rev. Code § 9.94A.535 14

Wash. Rev. Code § 9A.20.021 14

Treatise

1 W. LaFave, Substantive Criminal Law (2d ed. 2003) . . . 11

Miscellaneous

K. Halle, The Irrepressible Churchill (1985) 9

W. Rehnquist, Remarks to the Federal Judges Assn. Bd. of Directors (May 5, 2003) (http://www.supremecourtus.gov/publicinfo/ speeches/sp_05-05-03.html) 8

Reitz, Sentencing, in The Handbook of Crime and Punishment (M. Tonry ed. 1998) 6

IN THE

Supreme Court of the United States

RALPH HOWARD BLAKELY, JR.,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The defendant's claim in the present case is, in reality, an attack on all guided discretion sentencing systems. Although he claims to distinguish the federal system, acceptance of his thesis would inevitably apply the same rule to the federal

---

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

Sentencing Guidelines and similar systems in numerous States, just as *Apprendi* v. *New Jersey* inevitably brought down long-established capital sentencing systems.

Defendant's thesis would require treating as an "element" every fact used to depart upward from the standard sentencing range for an offense. It would likely require similar treatment for facts used to compute the standard sentence. Requiring aggravating facts to be proved beyond a reasonable doubt to a jury while mitigating facts have no such requirement would substantially skew sentencing in guided discretion systems. These systems have been constructed on the understanding that sentencing facts are determined on a symmetrical basis, just as they always were in the unfettered discretion systems. Skewing them downward in this manner would result in wholesale reductions of sentences below what the people, through the democratic process, have determined to be necessary for their protection from crime. This result would be contrary to the interests of victims of crime and the law-abiding public that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The trial court made extensive findings of fact in this case. J. A. 40-49. Briefly, defendant Ralph Howard Blakely and his wife Yolanda Blakely were involved in a bitter divorce and property dispute. Defendant went to Yolanda's home, in violation of a restraining order, and accosted her as she returned from her mailbox. He duct-taped her head and wrists and threatened her with death if she did not cooperate, apparently meaning that she dismiss the litigation over the family trust. He put her in a plywood box, threatened her with a knife to her throat and nostrils, and kept her there for hours until their 13-year-old son, known as Ralphy, returned. Defendant threatened Ralphy that he would shoot his mother if he did not cooperate or if he "tried anything." Cooperation included driving his mother's car on a public highway, even though he was only 13.

Ralphy later escaped. Defendant transported Yolanda through three states to the home of Mary Gillespie, who managed to contact the police.

Psychiatric diagnoses are conflicting as to whether defendant has schizophrenia. The evaluation which the trial court found to be the most thorough, and apparently credited, found that he has personality disorders.

The trial court made several conclusions. J. A. 49. Defendant's personality disorders did not significantly impair his capacity to appreciate the wrongfulness of his conduct or conform to the requirements of the law. The present offense involved deliberate cruelty and domestic violence within the sight of a minor child. The facts constitute substantial and compelling reasons to depart from the standard range sentence (49 to 53 months, with a firearm enhancement) and impose an exceptional, aggravated sentence. "A sentence of 90 months incarceration is a just and deserved punishment for defendant's conduct." *Ibid.*

The Washington Court of Appeals affirmed. Among other issues, it rejected Blakely's *Apprendi* claim, *i.e.*, that upward departure facts must be submitted to a jury and proved beyond a reasonable doubt. *State* v. *Blakely*, 111 Wash. App. 851, 870-871, 47 P. 3d 149, 159 (2002); J. A. 19. The Washington Supreme Court's decision in *State* v. *Gore*, 143 Wash. 2d 288, 314, 21 P. 3d 262, 276-277 (2001) was binding precedent to the contrary.

The Washington Supreme Court denied discretionary review. J. A. 60. This Court granted certiorari on October 20, 2003.

SUMMARY OF ARGUMENT

Guided discretion in sentencing is an important advance in the quest for fair, proportionate, and evenhanded sentencing. It avoids the opposite and equally noxious extremes of the rigid

common law mandatory system and the arbitrary system of unfettered discretion. Imposing *Apprendi* requirements would skew this system, distorting it from the balance struck when it was adopted. Making aggravating facts substantially more difficult to prove than mitigating facts would skew sentences downward on a wholesale basis. Legislative reaction to such a judicial distortion could ultimately hurt defendants on the low end of the culpability scale.

The fact that the Washington sentencing grid was enacted directly by the legislature, rather than indirectly through a sentencing commission, is not a valid basis for distinguishing the system from the federal system. *Apprendi* is based on the functional equivalence of a fact to an element of an offense, not on the source of the requirement. The entire guidelines approach to sentencing stands or falls in this case.

The open-ended factors that may be used for departure do not resemble elements within the meaning of *Apprendi*. The broad discretion and the myriad facts that may be considered make this, in terms borrowed from the capital cases, a selection decision and not an eligibility decision. *Apprendi* does not apply.

ARGUMENT

I. Sentencing reform through structured discretion should not be penalized with additional constitutional restrictions.

"Let no good deed go unpunished," would be an apt subtitle for the defendant's brief in this case. The State of Washington, like the Congress and many of its sister States, has turned to a structured-discretion approach to sentencing through sentencing guidelines.[2] Defendant's contention, in essence, is that the

2. We understand that the Washington system will be explained in detail in the State's brief and therefore will not repeat that discussion here.

system of structured discretion brings down upon the state Fifth and Sixth Amendment requirements that unquestionably did not apply to the system of unfettered discretion it replaced. See *Koon* v. *United States*, 518 U. S. 81, 92 (1996) (describing change made by federal Sentencing Reform Act of 1984). Such a holding would be a substantial setback for the quest for fair and effective sentencing policy.

Sentencing policy in America has gone through three phases. At the time of the founding, the trial judge in a felony case had little discretion. See *Apprendi* v. *New Jersey*, 530 U. S. 466, 478-479 (2000). The sentence followed from the crime as determined by the jury's verdict and the peculiar issue of benefit of clergy. See *ibid.* *Apprendi* asserts an "invariable linkage of punishment with crime" at this time, mentioning benefit of clergy only in a parenthetical. *Ibid.* By failing to recognize the central role of benefit of clergy in common-law sentencing practice, *Apprendi* seriously overstated the linkage between offense and punishment at the time of the founding. Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Ring* v. *Arizona*, No. 01-488, pp. 3-5. Even so, for present purposes it is sufficient to note that punishment of felons was determined by a discrete number of facts and was not discretionary with the judge. See *id.*, at 5-6.

The shortcomings of the common law system are obvious. No criminal code, no matter how detailed, can hope to measure the culpability of individual defendants in real cases merely by the specification of predetermined elements of offenses. Such a system imposes equal sentences on defendants of widely differing culpability. "It is a wise man who said there is no greater inequality than the equal treatment of unequals." *Dennis* v. *United States*, 339 U. S. 162, 184 (1950) (Frankfurter, J., dissenting).

The next phase in sentencing policy was a lurch to the opposite extreme. Under this system, the judge had discretion to choose the sentence within a broad range. See *Mistretta* v. *United States*, 488 U. S. 361, 363 (1989). Not only was the

discretion broad, but it was essentially unreviewable. The trial "court's determination as to what sentence was appropriate met with virtually unconditional deference on appeal." *Id.*, at 364; see also *Koon*, 518 U. S., at 96.

For a decision as controversial and value-laden as the punishment of crime, such unfettered discretion inevitably produced widely disparate sentences for similarly situated defendants. For capital cases, both unfettered discretion and fixed sentences have been declared unconstitutional. See *Furman* v. *Georgia*, 408 U. S. 238, 239-240 (1972) (*per curiam*); *Woodson* v. *North Carolina*, 428 U. S. 280, 301 (1976) (lead opinion). Guided discretion is now the only constitutional option. See *Sawyer* v. *Whitley*, 505 U. S. 333, 369 (1992) (Stevens, J., concurring in the judgment).

For noncapital sentencing, the Congress came to the same conclusion for much the same reason. So did many of the States.[3] Under the broad, unreviewable discretion existing before 1984, Congress found "'federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances.'" *Koon*, 518 U. S., at 92 (quoting S. Rep. No. 98-225, p. 38 (1983)). Prior to the Sentencing Guidelines, the change from the rigid approach of the common law to the system of standardless discretion had only replaced the equal treatment of unequals with the unequal treatment of equals. That was little or no improvement.

The precedents are clear beyond question that under the standardless discretion system, the findings of facts that went into the judge's decision were not subject to the same constitutional restrictions as the elements of the offense. See, *e.g.*, *Williams* v. *New York*, 337 U. S. 241, 252 (1949).

---

3. "By 1996, more than twenty U. S. jurisdictions . . . had chartered" sentencing commissions. Reitz, Sentencing, in The Handbook of Crime and Punishment 547 (M. Tonry ed. 1998).

> "Our case law has long recognized a natural dichotomy between the guilt and penalty phases. The jury trial right contained in the Sixth Amendment . . . does not apply at sentencing . . . . Likewise inapplicable at sentencing is the requirement of the Due Process Clause that the prosecution prove the essential facts beyond a reasonable doubt." *Mitchell* v. *United States*, 526 U. S. 314, 337 (1999) (Scalia, J., dissenting).

"The Guidelines did not alter this aspect of the sentencing court's discretion." *United States* v. *Watts*, 519 U. S. 148, 152 (1997) (*per curiam*). In *Watts*, this Court upheld the use of a firearm offense in calculating the sentence for a drug offense, despite Watts' acquittal of the firearm offense. *Id.*, at 149-150. The basis of the holding was that acquittal only established reasonable doubt, while use of the offense for setting the sentence required only preponderance of the evidence. See *id.*, at 156-157. Acceptance of defendant's argument in the present case would require overruling *Watts*. If a fact authorizing departure from the presumptive sentence is subject to the jury trial and burden of proof requirements for elements of an offense, facts which go into the calculation of that sentence must be also.

The defendant's proposed restriction of sentencing information would be a step backward for sentencing reform. The essence of a guided discretion system is to establish a "heartland" range of sentences, considering the factors involved in typical cases, but allow discretion to "depart" when the case is unusual in a way not accounted for by those factors. See *Koon*, 518 U. S., at 93-94. These departures are intended to be symmetrical, upward based on aggravating facts and downward based on mitigating facts. See *id.*, at 94.

Defendant's proposed limitation would fundamentally alter the bargain struck by the legislature in enacting a guided discretion system, skewing the distribution of sentences downward. Under this limitation, facts justifying a downward departure need only be established by a preponderance of

evidence, while those for upward departure must be established beyond a reasonable doubt. Crimes committed by the defendant which can be proven by a preponderance of the evidence but not beyond a reasonable doubt have long been established as a legitimate factor in determining the sentence. See *Watts*, 519 U. S., at 152-153. Similarly, if a drug dealer succeeds in flushing away most of the cocaine between the police officers' knock-and-announce and their entry, see *United States* v. *Banks*, 540 U. S. __ (No. 02-473, Dec. 2, 2003) (slip op., at 9), the quantity should still be considered, if established by preponderance, for the purpose of setting the sentence within the statutory range, even though the range is determined by the amount that can be proven beyond a reasonable doubt. Cf. *Edwards* v. *United States*, 523 U. S. 511, 515 (1998) (unanimous).

The perception that sentencing under the Guidelines is being skewed downward can have regrettable legislative consequences. "Congress has recently indicated rather strongly, by the Feeney Amendment, that it believes there have been too many downward departures from the Sentencing Guidelines." W. Rehnquist, Remarks to the Federal Judges Assn. Bd. of Directors (May 5, 2003) (http://www.supremecourtus.gov/publicinfo/speeches/sp_05-05-03.html). The resulting legislation "could amount to an unwarranted and ill-considered effort to intimidate individual judges in the performance of their judicial duties." *Ibid.*; see Pub. L. 108-21, § 401, 117 Stat. 650, 667-676.

Amicus Kansas Public Defender says there is no need to worry, because the Kansas Legislature meekly acceded to the judicial skewing of its system. Brief for Kansas Public Defender as *Amicus Curiae* 6-7. This single example provides little, if any, basis for believing that other legislatures will react the same way.

Sentencing under skewed information is fundamentally unfair to the people, as this Court recognized in *Payne* v. *Tennessee*, 501 U. S. 808, 825 (1991). Legislative reaction to

correct the balance is likely, and it may take the form of further restrictions on downward departures or more mandatory minimums. Given what we have already seen with the Feeney Amendment, these possibilities are quite real.

Once before, this Court has penalized states for structuring discretion, placing on them a greater burden in litigation than was placed on States that left officials' discretion unfettered and therefore subject to greater abuse. That was a mistake that has been corrected, and it should not be repeated.

In *Hewitt* v. *Helms*, 459 U. S. 460 (1983) and subsequent cases, the entitlement of a prisoner to due process protection in prison disciplinary proceedings depended on the presence of a state-created "liberty interest," which in turn depended on the presence of "mandatory language in the [prison] regulations." See *Sandin* v. *Conner*, 515 U. S. 472, 482-483 (1995). In *Sandin*, the Court abandoned this approach, noting the "undesirable effect[]" that the approach "creates disincentives for States to codify prior management procedures in the interest of uniform treatment." *Id.*, at 482.

Acceptance of defendant's thesis would create a similar disincentive for the structuring of sentencing discretion. Given that unfettered discretion can be based on factfinding by the judge with no greater burden of proof for aggravating facts than for mitigating facts, converting those aggravating facts into elements merely because the state structures the discretion creates a disincentive for seeking uniformity. Conversely, it creates an incentive to take one step backward to the arbitrariness of unfettered discretion or two steps backward to the rigidity of no discretion.

No system of discretion is perfect, and the Sentencing Guidelines have their critics. But criticism of the guided discretion approach (as distinguished from a criticism of particular guidelines) calls to mind Winston Churchill's famous quip about democracy—the worst form of government except for all the others that have been tried. See K. Halle, The

Irrepressible Churchill 236 (1985). Guided discretion produces results that apportion punishment to culpability more evenhandedly than any of the alternatives. This approach to sentencing should not be penalized without compelling reason, and there is no compelling reason.

II. There is no basis for distinguishing the Washington system from the federal system for Sixth Amendment purposes.

Defendant seeks to distinguish the Washington system from the federal on two grounds: that the system was enacted by the Washington Legislature rather than a commission, Brief for Petitioner 2, and that the grounds for upward departure are slightly more restricted. *Id.*, at 3, n. 2.

Amici NACDL and FAMA offer ominously that the skewing of the federal Sentencing Guidelines may properly be left for "a later day." Brief for National Assn. of Criminal Defense Lawyers and Families Against Mandatory Minimums as *Amici Curiae* in Support of the Petition for Certiorari 14. We have seen this divide-and-conquer gambit before. Compare *Apprendi* v. *New Jersey*, 530 U. S. 466, 496-497 (2000) (capital cases distinguishable, not controlling precedent), with *Ring* v. *Arizona*, 536 U. S. 584, 609 (2002) (capital cases not distinguishable, *Apprendi* requires overruling).

Before *Apprendi* metastasizes any further, the implications for overturning well-settled practices should be thoroughly understood. If a decision for the defendant in the present case is going to alter the balance struck by legislative compromise not only in the State of Washington but also in the Congress and in numerous states, see *supra*, at 6, that consequence should be known now and considered carefully before deciding to take such a step.

Apprendi does, of course, refer to the sentence ranges and limits as "statutory" or "prescribed by the legislature" numerous

times. See, *e.g.*, 530 U. S., at 481. That does not mean, though, that a presumptive sentence established directly by statute is distinguishable for this purpose from one established indirectly through a legislatively created commission. The dispositive question is when a purported sentencing factor has crossed the line so that it *functions* as an element of an offense and must be treated as an element for jury trial and burden-of-proof purposes. See *id.*, at 494-495. That function does not depend on the source of the factor.

The legislative branch has the authority to define elements of crimes when it chooses to exercise it, but the authority is not necessarily exclusive. The original English common law crimes were defined in case law, not statutes, see 1 W. LaFave, Substantive Criminal Law § 2.1(b), pp. 104-105 (2d ed. 2003), and "most of the states in the beginning had common law crimes." *Id.*, § 2.1(c), at 106. Some states still have common law crimes, despite the adoption of comprehensive criminal codes. See *id.*, § 2.1(c), at 107, and n. 20. Although there are generally no federal common law crimes, Congress can and has "provided for common law crimes in the District of Columbia" and federal enclaves. *Id.*, § 2.1(c), at 107-108. In military justice, Congress can delegate the designation of death penalty - eligibility circumstances to the President. *Loving* v. *United States*, 517 U. S. 748, 769 (1996). These circumstances are elements for the purpose of *Apprendi*. See *Ring*, 536 U. S., at 609.

An "offense" is not necessarily defined directly by a statute, and in the States may not even be indirectly defined by statute. The central question of whether a fact is an element of an offense for jury trial and burden-of-proof purposes therefore cannot depend on whether the legislature defined the offense directly, indirectly, or not at all.

Defendant's argument, in essence, is that the facts defining a presumptive sentence as established in the Washington Legislature's sentencing grid amount to an "offense" for *Apprendi* purposes and that any fact needed to depart upward

effectively amounts to an element of a greater offense. If that were true for a grid enacted directly by the legislature, it would be equally true for the grid established indirectly by Congress through the Sentencing Commission. It would be nonsensical to hold that the sentencing grid defines offenses if the State adheres to the stricter separation-of-powers view of the *Mistretta* dissent, but an identical grid placing an identical restraint on the sentencing judge does not define offenses if the legislature delegates its creation to a commission. See *Apprendi*, 530 U. S., at 523, n. 11 (Thomas, J., concurring).

The second claimed ground of distinction is that *some* duplication of elements with sentencing factors is allowed in the federal system but not the Washington system. Brief for Petitioner 3, n. 2. This is a perverse rationale. See *supra*, at 4. If this Court should declare present Washington practice unconstitutional on this basis, the Washington Legislature could reinstate it by *removing* a protection presently extended to defendants in that State. Constitutional principles ought not depend on such quirks.

III. The relevant "range," for purposes of *Apprendi*, is the range set by statute for Class B felonies.

The rule of *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000) applies to a factual finding, however designated, that is "the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." *Id.*, at 494, n. 19. It does not apply to "a circumstance . . . that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense." *Ibid.* (emphasis in original). The present case turns on the question of what is the "range" and what is "authorized" in a guidelines system.

The essence of a factor subject to *Apprendi* is that "it increase[s] . . . the maximum range within which the judge could exercise his discretion . . . ." *Id.*, at 474. Defendant maintains that the standard range sentence in the sentencing

grid is the relevant range, because the sentencing judge must find aggravating circumstances in order to depart. Brief for Petitioner 13-14. This argument distorts *Apprendi* beyond recognition.

In a system of unfettered, unreviewable discretion, a sentencing judge *could* impose a maximum sentence in the absence of any aggravating facts whatever. Such a sentence, although legal, would be arbitrary and unjust. That is why Congress and numerous States have abandoned such systems and replaced them with guided, reviewable discretion. An open-ended requirement that the judge find some aggravating facts before imposing a sentence at the high end of a range is a far cry from the sentence enhancement in *Apprendi* that required a finding of one particular fact in order to raise the ceiling.

The capital cases are instructive here, because this is the area where guided discretion has received the greatest scrutiny. The cases clearly separate the eligibility decision from the selection decision. See *Tuilaepa* v. *California*, 512 U. S. 967, 971 (1994); *Shafer* v. *South Carolina*, 532 U. S. 36, 50 (2001) ("discrete and sequential functions"). To raise the ceiling of punishment which may be considered from life in prison to death, the jury must find an aggravating circumstance off a prescribed, statutory list defined in advance and subject to review for vagueness. See *Tuilaepa*, *supra*, at 972. In the selection decision, on the other hand, open-ended consideration of a myriad of factors is allowed. *Id.*, at 979-980. The eligibility factors are subject to *Apprendi*. *Ring* v. *Arizona*, 536 U. S. 584, 609 (2002). The facts considered in the selection decision are not. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Schriro* v. *Summerlin*, No. 03-526, pp. 20-21. The open-ended nature of the departure decision in Washington noncapital sentencing makes it a selection decision, not an eligibility decision. Former Wash. Rev. Code § 9.94A.120(2), App. to Pet. for Cert. 52a, merely required "substantial and compelling reasons" to depart, and former § 9.94A.390 pro-

vided a list of factors that were expressly illustrative and not exclusive. See App. to Pet. for Cert. 60a; see also Wash. Rev. Code § 9.94A.535 (same language in present statute). By requiring that the sentencing judge find aggravating circumstances to depart from the standard range, Washington has simply added structure, guidance, and reviewability to the discretionary sentencing choice that *Apprendi* unmistakably held was not subject to its restrictions. See 530 U. S., at 494, n. 19.

In footnote 16, the *Apprendi* Court acknowledged, in response to the dissent, that a State could achieve the same result as the New Jersey statute by extending statutory maximums and then "giving judges guided discretion as to a few specially selected factors within that range . . . ." *Id.*, at 490, n. 16. The Court counted on "structural democratic constraints" and other precedents, not the *Apprendi* rule, to prevent that from actually happening. *Id.*, at 490-491, n. 16. If a guided discretion system enacted as a subterfuge to evade *Apprendi* would not be subject to its rule, then a guided discretion system enacted for the entirely proper purpose of dispensing evenhanded justice surely is not.

The sentencing range, for the purpose of *Apprendi*, is the range for Class B felonies set forth in Wash. Rev. Code § 9A.20.021. The facts supporting departures in this system are true sentencing circumstances, not elements in disguise, and may be found by the judge by the preponderance of the evidence.

CONCLUSION

The decision of the Washington Court of Appeals should be affirmed.

January, 2004

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

Supreme Court, U.S.
FILED
JAN 23 2004
OFFICE OF THE CLERK

(11)

No. 02-1632

In the Supreme Court of the United States

RALPH HOWARD BLAKELY, JR., PETITIONER

v.

STATE OF WASHINGTON

ON WRIT OF CERTIORARI TO THE WASHINGTON COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

THEODORE B. OLSON
Solicitor General
Counsel of Record
CHRISTOPHER A. WRAY
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
MATTHEW D. ROBERTS
Assistant to the Solicitor General
NINA GOODMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a fact (other than a prior conviction) that justifies an upward departure from a state statutory sentencing guidelines range must be found in accordance with the procedures required by *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000).

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
A. The Washington sentencing guidelines	1
B. The present controversy	3
Summary of argument	6
Argument:	
A sentencing court may constitutionally make an upward departure decision under the Washington sentencing guidelines	10
A. *Apprendi* v. *New Jersey* applies only when a defendant's exposure to increased punishment depends on the finding of a fact specified by the legislature	11
1. The sentencing court has broad authority to find facts and make judgments bearing on an appropriate punishment	11
2. Constitutional limits on sentencing exist to preclude circumvention of Fifth and Sixth Amendment guarantees	12
3. *Apprendi* is limited to statutorily required factual determinations	14
B. *Apprendi* does not apply to upward departure determinations under the Washington guidelines system	15
1. A defendant's exposure to a sentence above the presumptive range is not contingent on the court's finding of legislatively specified facts	15
2. Upward departure determinations are fundamentally different from the factual findings at issue in *Ring*	20

Table of Contents—Continued: Page

3. Upward departure determinations closely resemble the traditional role of judges in sentencing 21
4. Allowing judges to make departure determinations based on their own fact-finding does not undermine the constitutional values protected by *Apprendi* 22

C. Applying *Apprendi* to upward departures under the Washington system would raise questions about the extent to which *Apprendi* applies to other guidelines systems 25
1. The federal sentencing guidelines operate differently from the Washington system 26
2. A decision invalidating Washington's departure mechanism would raise questions about the federal sentencing guidelines' constitutionality 29

D. Application of *Apprendi* to guidelines determinations would undermine sentencing reform efforts 30
1. Applying *Apprendi* to guidelines sentencing would create significant problems 31
2. The undermining of guidelines systems would have substantial costs for sentencing reform 33

Conclusion 35

TABLE OF AUTHORITIES

Cases:

Apprendi v. *New Jersey*, 530 U.S. 466 (2000) ..... *passim*
Harris v. *United States*, 536 U.S. 545 (2002) 14, 23
Jackson v. *Virginia*, 443 U.S. 307 (1979) 32-33
Jones v. *United States*, 526 U.S. 227 (1999) 12, 15

Cases—Continued: Page

Koon v. *United States*, 518 U.S. 81 (1996) 21
McMillan v. *Pennsylvania*, 447 U.S. 79 (1986) 12
Mistretta v. *United States*, 488 U.S. 361 (1989) 26, 27, 30
Monge v. *California*, 524 U.S. 721 (1998) 32
Nichols v. *United States*, 511 U.S. 738 (1994) 12, 27
North Carolina v. *Alford*, 400 U.S. 25 (1970) 4
Pennsylvania ex rel. Sullivan v. *Ashe*, 302 U.S. 51 (1937) 34
Ring v. *Arizona*, 536 U.S. 584 (2002) 7, 13, 21
Sattazahn v. *Pennslyvania*, 537 U.S. 101 (2003) 21, 33
State v. *Armstrong*, 723 P.2d 1111 (Wash. 1986) 19-20
State v. *Fisher*, 739 P.2d 683 (Wash. 1987) 3, 17, 18
State v. *Gore*, 21 P.3d 262 (Wash. 2001) 3, 6, 19
State v. *Nordby*, 723 P.2d 1117 (Wash. 1986) 16, 19
State v. *Perez*, 847 P.2d 532 (Wash. Ct. App.), review denied, 863 P.2d 74 (Wash. 1993) 19, 20, 21
Stinson v. *Uinted States*, 508 U.S. 36 (1993) 30
United States v. *Cotton*, 535 U.S. 625 (2002) 31
United States v. *DiFrancesco*, 449 U.S. 117 (1980) 32
United States v. *Gaudin*, 515 U.S. 506 (1995) 12
United States v. *Grayson*, 438 U.S. 41 (1978) 12
United States v. *Tucker*, 404 U.S. 443 (1972) 12
United States v. *Watts*, 519 U.S. 148 (1997) 12, 29
Williams v. *New York*, 337 U.S. 241 (1949) 6, 11, 29
Wisconsin v. *Mitchell*, 508 U.S. 476 (1993) 12
Witte v. *United States*, 515 U.S. 389 (1995) 12, 14, 29

Statutes and rules:

PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650:
§ 401(b), 117 Stat. 668 30
§ 401(g), 117 Stat. 671 30
§ 401(i), 117 Stat. 672 30
18 U.S.C. 3553(b)(1) (as amended Apr. 30, 2003) 25
28 U.S.C. 991(a) 26

Statutes and rules—Continued: Page

Sentencing Reform Act of 1981, Wash. Rev. Code
§§ 9.94A.010 *et seq.* (1997) 1-2
§ 9.94A.010 ..... 2, 10
§ 9.94A.120(1) 3
§ 9.94A.120(2) 3, 8, 10, 16, 19
§ 9.94A.120(13) 16
§ 9.94A.125 2
§ 9.94A.210(4)(b) 19
§ 9.94A.310(1) 2
§ 9.94A.320 ..... 2, 27
§ 9.94A.350 2
§ 9.94A.360 2
§ 9.94A.370 2
§ 9.94A.370(2) 3, 5, 17
§ 9.94A.390 ..... 3, 8, 17, 19
§ 9.94A.390(1)(e) 6
§ 9.94A.390(2)(a) 5
§ 9.94A.390(2)(h) 5
§ 9.94A.420 2
Washington Criminal Code, Wash. Rev. Code:
§ 9A.20.021 4
§ 9A.20.021(1) 2
§ 9A.36.021 4
§ 9A.40.030 4
United States Sentencing Guidelines:
§ 1B1.1(a) 27
§ 1B1.2(a) 27
§ 1B1.3(a) 28
§ 1B1.3(a)(1) 28
§ 1B1.3(a)(2) 28
§ 2B2.1 31
§ 2D1.1(b)(1) 27
§ 5K2.0(a)(2) (as amended Oct. 27, 2003) 25
Ch. 1, Pt. A, intro. comment 4(a) 28, 29
Ch. 3 28
Ch. 3, Pt. A 31

Rules—Continued: Page

Ch. 3, Pt. B 32
Ch. 3, Pt. C 32
State of Wash. Sentencing Guidelines Comm'n, *Adult Sentencing Guidelines Manual* (1997) 16
§ 9.94A.320, comment 27
§ 9.94A.390, comment 16, 19

Miscellaneous:

American Law Institute, Model Penal Code: Sentencing Report (2003) (available at <www.ali.org>) 25, 33, 34
Arthur W. Campbell, *Law of Sentencing* (2d ed. 1991) 33
United States Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statement* (1987) 29

In the Supreme Court of the United States

No. 02-1632

RALPH HOWARD BLAKELY, JR., PETITIONER

v.

STATE OF WASHINGTON

ON WRIT OF CERTIORARI
TO THE WASHINGTON COURT OF APPEALS

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether a fact (other than a prior conviction) that justifies an upward departure from a state statutory sentencing guidelines range must be found in accordance with the procedures required by *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). Although the Washington sentencing guidelines system differs in significant respects from the United States Sentencing Guidelines, a decision invalidating judicial departure authority here could call into question the constitutionality of the federal Guidelines. The United States therefore has a substantial interest in the outcome of this case.

STATEMENT

A. The Washington Sentencing Guidelines

In 1981, the State of Washington became one of the first States in the nation to enact a sentencing guidelines system for the sentencing of felony offenders. See Sentencing Reform Act (Act) of 1981, Wash. Rev. Code §§ 9.94A.010 *et seq.*

(1997).[1] As the Act's introductory section explains, the purpose of the new sentencing system was "to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences." *Id.* § 9.94A.010.

The Washington Criminal Code establishes maximum prison sentences for felonies based on whether the crime is a class A, B, or C felony. Wash. Rev. Code § 9A.20.021(1). For a class A felony, the maximum punishment is life imprisonment; for a class B felony, the maximum punishment is ten years; and for a class C felony, the maximum punishment is five years. *Ibid.* The Act then establishes "presumptive sentencing ranges" for felony offenses based on the "seriousness level" of the offense and the defendant's "offender score." *Id.* § 9.94A.310(1) (Table 1). The offense seriousness level "is determined by the offense of conviction." *Id.* § 9.94A.350; see *id.* § 9.94A.320 (Table 2). The offender score is based on the offender's criminal history. *Id.* § 9.94A.360. The presumptive range is adjusted upward if the offender or an accomplice was armed with a deadly weapon when committing the crime. *Id.* §§ 9.94A.125, 9.94A.370.[2] "If the presumptive sentence duration given in the sentencing grid exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence." *Id.* § 9.94A.420.

The sentencing court is to impose a sentence within the presumptive sentencing range, unless it finds "that there are

[1] After petitioner's sentencing, the Washington legislature amended and recodified portions of the Act. The amendments did not make any substantive change that affects the issues in this case. The citations in this brief, as in the state court opinions, are to the 1997 version of the Act.

[2] When there is a jury trial on the underlying offense, the deadly weapon finding must be made by the jury in a special verdict. Wash. Rev. Code § 9.94A.125.

substantial and compelling reasons justifying an exceptional sentence." Wash. Rev. Code § 9.94A.120(1) and (2). The Act provides a list of "factors which the court may consider in the exercise of its discretion to impose an exceptional sentence." *Id.* § 9.94A.390. Those factors are "illustrative only and are not intended to be exclusive reasons for exceptional sentences." *Ibid.* "An exceptional sentence is appropriate when the circumstances of a particular crime distinguish it from other crimes within the same statutory definition," for example, because there is "extraordinarily serious harm or culpability." See *State* v. *Fisher*, 739 P.2d 683, 686, 688 (Wash. 1987). Therefore, "the sentencing judge's reasons for imposing a sentence outside the presumptive range must take into account factors other than those which are necessarily considered in determining the presumptive range for the offense." *Id.* at 686.

In determining the appropriate sentence (including whether an exceptional sentence is warranted), the court may consider facts proved at sentencing by a preponderance of the evidence. Wash. Rev. Code § 9.94A.370(2). In imposing an exceptional sentence, the outer boundary of the defendant's sentencing exposure is the statutory maximum. *State* v. *Gore*, 21 P.3d 262 (Wash. 2001).

B. The Present Controversy

1. On October 26, 1998, petitioner kidnapped his estranged wife, Yolanda Blakely, from her home in Grant County, Washington. Petitioner attacked his wife and bound and gagged her with duct tape. He said that he had guns, ammunition, and knives; told her he wanted her to dismiss pending litigation involving a trust they had created; and warned her to cooperate or he would kill her and their son, 13-year-old Ralphy. J.A. 3, 41-42.

Petitioner forced Yolanda to climb into the back of his truck, where he locked her in a coffin-like vented wooden

box that he had constructed. While retrieving items from the house, petitioner repeatedly opened the lid of the box and pressed a knife to Yolanda's neck or nose. J.A. 3, 42-43. When Ralphy arrived home from school, petitioner told him that his mother was in great danger and took him to the truck where he could hear Yolanda yelling from inside the wooden box. Petitioner ordered Ralphy to drive his mother's car and told him that if he "tried anything," petitioner would shoot the box with a shotgun. J.A. 3-4, 43.

Petitioner drove the truck toward the couple's home in Montana, and Ralphy followed in the car. When Ralphy tried to seek help at a truck stop, petitioner left him behind and drove on to Montana. During the drive, petitioner alternately let his wife sit in the front seat and forced her to ride in the wooden box. Petitioner and Yolanda arrived at the house of a friend, who secretly called the police. The police arrived and arrested petitioner. J.A. 4-5, 43-47.

2. The State of Washington charged petitioner with two counts of first degree kidnapping involving domestic violence. J.A. 5. After a pretrial competency hearing at which a jury found petitioner competent to stand trial, petitioner agreed to enter a plea under *North Carolina* v. *Alford*, 400 U.S. 25 (1970), to one count of second degree kidnapping involving domestic violence with a deadly weapon and one count of second degree assault involving domestic violence with a deadly weapon. J.A. 6-7, 24, 75-76. The plea agreement stated that the maximum term of imprisonment for each offense was ten years. J.A. 63. See Wash. Rev. Code §§ 9A.36.021, 9A.40.030; *id.* § 9A.20.021. The plea agreement also stated that the standard sentencing range for petitioner's offenses was 49-53 months for the kidnapping charge and 13-17 months for the assault charge. J.A. 63. Both the plea agreement and the court, at the plea hearing, advised petitioner that he could be sentenced above the standard range if the judge found compelling reasons, and petitioner

stated that he understood. J.A. 66; Verbatim Report of Proceedings, Vol. I (VRP I), at 549-550.

At sentencing, the court expressed the view that a sentence within the standard range would be "too lenient" because petitioner committed the kidnapping with "deliberate cruelty" and in the presence of his son. VRP II, at 41-42; see J.A. 7. The court stated that it intended to sentence petitioner to 90 months of imprisonment on the kidnapping count. VRP II, at 42-44. Because petitioner objected to the court's underlying factual findings, the court scheduled an evidentiary hearing as required by Washington law. VRP I, at 562-563; J.A. 8; see Wash. Rev. Code § 9.94A.370(2).

Before the evidentiary hearing, petitioner filed a motion arguing that the court was required to impose a sentence within the standard range. He argued that a determination that an upward departure was justified based on facts found by the court by a preponderance of the evidence would be unconstitutional under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). VRP I, at 566-570; see J.A. 13. The court denied petitioner's motion. J.A. 51-59.

Following the evidentiary hearing, the court imposed an exceptional sentence of 90 months of imprisonment on the kidnapping charge, to run concurrently with a standard sentence of 14 months on the assault charge. J.A. 8, 32. Based on detailed findings of fact, J.A. 40-50, the court concluded that petitioner's "[r]epeatedly and protractedly confining his victim in a coffin-like box manifested deliberate cruelty to the victim," as described in Washington Revised Code § 9.94A.390(2)(a). J.A. 49. The court further concluded that the kidnapping "involved domestic violence, * * * occurred within sight and sound of the victim and [petitioner's] minor child," and "manifested deliberate cruelty to, and intimidation of, the victim." *Ibid.* (citing Wash. Rev. Code § 9.94A.390(2)(h)). The court also concluded that, although petitioner's capacity to appreciate the wrongfulness of his

conduct was impaired by personality disorders, see *id.* § 9.94A.390(1)(e), the disorders "did not significantly impair [petitioner's] capacity to act with deliberate cruelty." J.A. 49. Considering the purposes of the Washington Sentencing Reform Act, the applicable presumptive sentencing range, and its factual findings and legal conclusions, the court determined that there were "substantial and compelling reasons justifying an exceptional, aggravated sentence." *Ibid.*

3. The Washington Court of Appeals affirmed. J.A. 2-23. As relevant here, the court rejected petitioner's claim that the upward departure violated *Apprendi*. J.A. 19. The court relied on *State* v. *Gore*, 21 P.3d 262 (Wash. 2001), in which the Washington Supreme Court held that, because the Washington sentencing statutes allow imposition of exceptional sentences only "within the maximum range determined by the Legislature," factual determinations that support a court's determination that an exceptional sentence is justified need not be submitted to a jury or proved beyond a reasonable doubt. J.A. 19 (citing *Gore*, 21 P.3d at 276-277).

The Supreme Court of Washington denied review. J.A. 60.

SUMMARY OF ARGUMENT

The findings underlying an upward departure from the presumptive sentencing range in the Washington Sentencing Reform Act are not subject to the jury-trial and reasonable-doubt guarantees that apply to facts that raise the maximum statutory sentence under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000).

A. Sentencing systems may constitutionally give a judge wide discretion to find facts by a preponderance of the evidence and to impose a particular punishment within the statutory range. *Williams* v. *New York*, 337 U.S. 241 (1949). There are, however, constitutional limits on the legislature's freedom to assign a fact-finding role to sentencing judges. In

order to prevent the legislature from circumventing the jury-trial and reasonable-doubt guarantees, this Court held in *Apprendi* that any fact, other than a prior conviction, "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. In *Ring* v. *Arizona*, 536 U.S. 584 (2002), the Court applied *Apprendi* to Arizona's capital sentencing scheme, making clear that a "statutory maximum" under *Apprendi* must be actually available to the sentencing court without the finding of an additional legislatively specified fact.

Apprendi and *Ring* do not cast doubt on the proposition that judicial discretion to find facts and exercise judgment about the appropriate punishment within the statutory range is constitutional. The procedural requirements of *Apprendi* apply only when the finding of a legislatively specified fact is essential to increase the statutory maximum penalty. The limitation of *Apprendi* to legislatively designated facts that raise the statutory maximum penalty is consistent with *Apprendi*'s purpose: to ensure that the legislature does not evade the procedural protections applicable to the determination of crimes, but instead remains responsive to "structural democratic constraints" in fixing the maximum punishment that is proportionate to a crime. 530 U.S. at 490 n.16.

B. Under those principles, *Apprendi* does not apply to the determinations involved in making an upward departure from the presumptive sentencing range under the Washington guidelines. The statutory maximum sentence is not the guidelines sentence, but the maximum term set forth elsewhere in Washington law. The Washington legislature has not specified an exclusive set of facts that exposes the defendant to a greater punishment than the presumptive sentencing range. Rather, the statute gives the sentencing court discretion to identify facts that justify an "exceptional sen-

tence" based on "substantial and compelling reasons." Wash. Rev. Code § 9.94A.120(2). Although the legislature identified "illustrative" circumstances that may warrant a departure, *id.* § 9.94A.390, the statute leaves the sentencing court free to identify others. The power to depart upwards thus resembles the traditional discretion exercised by a judge in an indeterminate sentencing scheme, *i.e.*, the power to find facts that warrant a more or less severe sentence within the defined range. Washington law structures the exercise of that discretion, but the legislature recognized that it could not anticipate all of the facts that might warrant an exceptional sentence. The legislature thus preserved judicial discretion to identify such facts and impose a sentence up to the statutory maximum.

Reinforcing the conclusion that the legislature has left room for the exercise of traditional judicial discretion is that the ultimate exposure of the defendant to a sentence above the presumptive range turns not solely on facts, but on the sentencing court's qualitative judgment that those facts provide "substantial and compelling reasons" for an exceptional sentence. *Apprendi* applies when a legislature provides that proof of certain facts exposes the defendant to greater punishment. A judicial judgment that, based on the particular record, the defendant should face greater punishment is not a "fact."

For those reasons, this case involves an entirely different sentencing system from the capital regime involved in *Ring* v. *Arizona*. In *Ring*, the Arizona statute precluded a capital sentence absent the finding of a *legislatively specified fact*; that fact was therefore subject to the procedures of *Apprendi*. In this case, the sentencing judge retains authority to reach the statutory maximum based on the exercise of discretion to identify exceptional circumstances. The legislature thus remains accountable for fixing the maximum sentence to which defendants convicted of a particular offense

may be subject, and the scheme is therefore consistent with the constitutional values underlying *Apprendi*.

C. A ruling that *Apprendi* applies to the Washington Sentencing Guidelines could have serious ramifications, especially if the Court accepted petitioner's view that a defendant's maximum sentence under *Apprendi* must be determined "'according to the facts reflected in the jury verdict alone' or the guilty plea." Pet. Br. 16-17 (quoting *Apprendi*, 530 U.S. at 483). Such a ruling could apply to a host of determinations under the United States Sentencing Guidelines that depend on judicial fact-finding.

There are possible distinctions between the federal guidelines and state statutory systems. Most prominently, the federal guidelines are promulgated by an administrative commission, not by Congress. And the presumptive sentence under the federal guidelines does not turn exclusively on the offense of conviction and the offender's criminal history, as Washington's generally does. Rather, conduct outside the elements of the offense enters into federal guidelines calculations at every level, thus making it difficult to view the guidelines range as a "statutory maximum." But it is uncertain whether those distinctions would be sufficient if this Court applied *Apprendi* here, since the United States Sentencing Guidelines have the force and effect of law, and it is theoretically possible to calculate a guidelines sentence based on the facts reflected in the jury verdict alone (although that would distort the intended operation of the Guidelines).

D. The consequence of applying *Apprendi* to guidelines sentencing systems would be to impair, and likely render unworkable, a valuable sentencing reform effort. Requiring a jury determination of the multitude of facts that enter into a guidelines determination in the federal system would

prove impossibly cumbersome; would complicate indictments; could lead juries to skew their verdicts to avoid real or imagined sentencing consequences; and would sharply limit appellate review of sentences. If those consequences forced the abandonment of guidelines sentencing, it would end the most promising sentencing reform movement in recent years. State and federal guidelines systems arose to address recurrent issues of disparate treatment of similarly situated offenders, and they were designed to increase fairness, transparency, and proportionality in sentencing. *Apprendi* requires the legislature to take responsibility for establishing the maximum sentence that may be imposed for commission of a particular crime. That requirement does not require the end of legislative efforts to channel sentencing discretion through guidelines systems.

ARGUMENT

A SENTENCING COURT MAY CONSTITUTIONALLY MAKE AN UPWARD DEPARTURE DECISION UNDER THE WASHINGTON SENTENCING GUIDELINES

The State of Washington enacted its sentencing guidelines system to "structure[], but * * * not eliminate, discretionary decisions affecting sentences." Wash. Rev. Code § 9.94A.010. Integral to the operation of that scheme is a departure authority under which sentencing courts have discretion to take into account factors that provide "substantial and compelling reasons justifying an exceptional sentence" outside the presumptive sentencing range, but within the statutory maximum. *Id.* § 9.94A.120(2). In entrusting the sentencing court with those discretionary decisions and the fact-finding underlying them, Washington did not violate the Constitution.

A. *Apprendi* v. *New Jersey* Applies Only When A Defendant's Exposure To Increased Punishment Depends On The Finding Of A Fact Specified By The Legislature

1. *The sentencing court has broad authority to find facts and make judgments bearing on an appropriate punishment*

This Court has long approved sentencing schemes allowing the judge to find facts bearing on the appropriate sentence for a crime of which the defendant has been found guilty, and to make a qualitative judgment about the appropriate punishment within the authorized range. See *Williams* v. *New York*, 337 U.S. 241 (1949). In *Williams*, the sentencing judge concluded that a defendant who had been found guilty of first-degree murder had sufficient culpability to warrant the death penalty. The sentencing court made its judgment about the appropriate level of punishment based on facts contained in a presentence report that had not been presented in open court or found by the jury. See *id.* at 242-245. The Court held that this sentencing procedure complied with the requirements of due process. *Id.* at 252. The Court explained that there has been a long tradition in this country "under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." *Id.* at 246. The Court thus held that a sentencing judge should not be "denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial." *Id.* at 247.

Since *Williams*, the Court has repeatedly reaffirmed that a trial judge may constitutionally be entrusted to make a judgment about what level of punishment is appropriate within the authorized range. In "making that determination, a judge may appropriately conduct an inquiry broad in scope,

largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U.S. 443, 446 (1972). The judge may consider "a wide variety of factors in addition to evidence bearing on guilt." *Wisconsin* v. *Mitchell*, 508 U.S. 476, 485 (1993); see, *e.g.*, *United States* v. *Watts*, 519 U.S. 148, 157 (1997) (per curiam) (conduct of which defendant was acquitted); *Witte* v. *United States*, 515 U.S. 389, 397-401 (1995) (uncharged conduct); *United States* v. *Grayson*, 438 U.S. 41, 49-54 (1978) (defendant's false testimony at trial). The Court has also repeatedly confirmed that the sentencing judge may find the facts that support his assessment of the appropriate level of punishment by a preponderance of the evidence rather than proof beyond a reasonable doubt. *Watts*, 519 U.S. at 156; *Nichols* v. *United States*, 511 U.S. 738, 747 (1994); *McMillan* v. *Pennsylvania*, 477 U.S. 79, 84-93 (1986).

2. *Constitutional limits on sentencing exist to preclude circumvention of Fifth and Sixth Amendment guarantees*

There are nevertheless constitutional limits on the role that a legislature may assign to judges at sentencing. The Constitution requires that a defendant's guilt of each element of a crime be found by a jury, based on proof beyond a reasonable doubt. *United States* v. *Gaudin*, 515 U.S. 506, 510 (1995). A legislature cannot evade that requirement by redesignating the elements of crimes as facts that a judge must find at sentencing before the judge is authorized to impose particular types or levels of punishment. See *Apprendi* v. *New Jersey*, 530 U.S. 466 (2002); *Jones* v. *United States*, 526 U.S. 227, 243-244 (1999).

In *Apprendi*, this Court implemented that principle by holding that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. The

Court explained that, when the legislature specifies a fact that, if found, triggers "an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." *Id.* at 494 n.19.

In *Ring* v. *Arizona*, 536 U.S. 584 (2002), the Court applied *Apprendi* to Arizona's capital sentencing scheme. Arizona law authorized imposition of the death penalty for murder, but a defendant found guilty by a jury of first-degree murder could not be sentenced to death unless the sentencing court made an additional factual finding on one of several, legislatively specified aggravating factors. *Id.* at 597, 603-604. *Ring* held that, under *Apprendi*, a finding on such a legislatively specified aggravating factor necessary to support a death sentence must be made by a jury. *Id.* at 609.

The Court reasoned that *Apprendi* requires that, "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Ring*, 536 U.S. at 602. Absent the factual finding specified by the legislature, the defendant is not exposed to the higher punishment, except in a purely formal sense. See *id.* at 603-604. The fact, however labeled, is thus "the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." *Id.* at 605 (quoting *Apprendi*, 530 U.S. at 494 n.19).

"Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" the Court held, "the Sixth Amendment requires that they be found by a jury." *Ring*, 536 U.S. at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19). *Ring* thus makes clear that, for purposes of the *Apprendi* rule, the "prescribed statutory maximum" is the maximum sentence that may be imposed without the finding of any additional legislatively specified fact.

3. Apprendi *is limited to statutorily required factual determinations*

Neither *Apprendi* nor *Ring* alters the principle, reflected in *Williams* and later cases, that a judge may make qualitative judgments about the appropriate level of punishment within the range prescribed by statute, and those judgments may be based on facts found by the judge himself by a preponderance of the evidence. To the contrary, *Apprendi* explained that it is not "impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute." 530 U.S. at 481. Nor do *Apprendi* and *Ring* mean that the procedural requirements specified in *Apprendi* are mandated whenever the legislature places limits on the sentencing judge's discretion to impose punishment.

For example, when the legislature specifies that a particular factual finding triggers a mandatory minimum sentence, that fact may be found by the judge at sentencing based on a preponderance of the evidence, even though the finding requires the judge to impose a higher sentence within the statutorily authorized range. See *Harris* v. *United States*, 536 U.S. 545, 568-569 (2002). Similarly, a factual finding that mitigates the available punishment by requiring the judge to impose a lower sentence also may be made by the sentencing judge by a preponderance of the evidence. See *Apprendi*, 530 U.S. at 491 n.16. And the legislature may require a sentencing judge to consider certain facts when imposing a sentence within the authorized range, such as uncharged criminal conduct committed by the defendant, and still provide for the judge to determine the existence of those facts by a preponderance of the evidence. See *Witte*, 515 U.S. at 397-401. *Apprendi* applies only when the finding of a legislatively specified "fact" is essential to increase the "statutory maximum." See 530 U.S. at 494.

Imposing *Apprendi*'s requirements only when the legislature has made a defendant's exposure to increased punishment contingent on findings of facts that the legislature itself specifies vindicates *Apprendi*'s animating constitutional values. The Sixth Amendment right to trial by jury, and the due process right to insist on rigorous proof to establish guilt of an offense, are fully protected when there must be a jury finding beyond a reasonable doubt on the facts that establish the maximum punishment to which a defendant is exposed. If the legislature realizes that any defendant convicted of a particular offense may receive the maximum punishment associated with the jury's verdict, the democratic process itself will restrain the legislature from reducing the jury's role to "low-level gatekeeping." *Jones*, 526 U.S. at 244. "[S]tructural democratic constraints exist to discourage legislatures from enacting penal statutes that expose *every* defendant convicted of [a particular crime] to a maximum sentence exceeding that which is, in the legislature's judgment, generally proportional to the crime." *Apprendi*, 530 U.S. at 490-491 n.16.

B. *Apprendi* Does Not Apply To Upward Departure Determinations Under The Washington Guidelines System

1. *A defendant's exposure to a sentence above the presumptive range is not contingent on the court's finding of legislatively specified facts*

Apprendi does not apply to upward departure determinations under the Washington guidelines system because such departures are not conditioned on the finding of legislatively specified facts. Even without finding any particular fact identified by the legislature, a judge has discretion to impose a sentence up to the statutory maximum for the offense, when he identifies "substantial and compelling reasons." And no particular factual finding specified by the legislature automatically exposes the defendant to a sentence

above the standard range; the judge must always make a qualitative judgment that such a sentence is justified. The presumptive sentencing range under the Washington system thus does not set a "statutory maximum" for purposes of *Apprendi*.

a. Under Washington law, a sentencing court can support its decision to impose a sentence above the presumptive range—and up to the statutory maximum established by the offense of conviction—based on a virtually unlimited set of facts. As a result, the statute effectively gives the judge discretion to decide what facts might support a higher sentence, and to find those facts, in a fashion comparable to the discretion of the sentencing judge in *Williams* to find and consider facts bearing on an appropriate sentence. The outer boundary for the judge is not the presumptive sentencing range, but the statutory maximum specified for the offense in the Washington Revised Code.

The statute affords the judge sentencing discretion by giving the judge legal authority to impose a sentence above the presumptive range up to the maximum for the offense specified by Washington Revised Code Chapter 9A.20 if, in the court's judgment, there are substantial and compelling reasons that justify an exceptional sentence. Wash. Rev. Code § 9.94A.120(2), (13). The Washington legislature "recognized that 'not all exceptional fact patterns can be anticipated,' * * * and that the trial court must tailor the sentence to the facts of each case." *State* v. *Nordby*, 723 P.2d 1117, 1118 (Wash. 1986) (quoting State of Washington, *Adult Sentencing Guidelines Manual* (1997) (*Wash. Guidelines Manual*) § 9.94A.390, comment.) Therefore, although the legislature listed some "aggravating circumstances" that "the court may consider in exercising its discretion" to conclude that an exceptional sentence is justified, the listed facts "are illustrative only and are not intended to be

exclusive reasons for exceptional sentences." Wash. Rev. Code § 9.94A.390.

The statute does channel the judge's exercise of discretion. Because an exceptional sentence is reserved for atypical cases, the judge cannot rely on the elements of the offense or other facts that have already been taken into account in setting the presumptive range. See *Fisher*, 739 P.2d at 686. In addition, under the "real facts" rule, the judge generally may not rely on facts that establish the elements of a more serious or additional crime. See Pet. App. 16a; Wash. Rev. Code § 9.94A.370(2). But aside from those narrow restrictions, the facts that may support a sentence above the presumptive range are unlimited and largely unspecified.

The Washington scheme thus preserves the sentencing court's traditional discretion to fix an appropriate sentence within defined statutory maximum terms. When a legislature creates broad sentencing ranges for particular offenses, as Washington has done, it necessarily contemplates that a spectrum of cases will arise under a particular statute and that courts will sentence defendants according to their individual culpability in light of all of the varied circumstances of the case. A guidelines system with a departure mechanism, such as Washington's, structures the district court's actions and makes more explicit the legislature's expectation that harsher sentences are reserved for more serious offenders, while more lenient sentences are reserved for less serious offenders. But the system also respects the unique judicial capacity, borne of experience with a wide variety of cases, to assess at sentencing whether particular facts, not anticipated by the legislature, warrant a sentence different from the standard range.

Because the legislature has not itself specified the set of facts that expose a defendant to a sentence above the presumptive range, the presumptive range does not operate as a statutory maximum. That maximum remains the maxi-

mum established in the statutes grading the severity of the offense and specifying maximum terms for each grade. As a result, determinations to impose an exceptional sentence above the presumptive range are not subject to *Apprendi*.

b. Reinforcing the conclusion that the Washington scheme is designed to preserve the sentencing court's discretion is that a defendant is exposed to a sentence above the presumptive range not by factual findings themselves, but by the sentencing court's judgment that those facts justify an exceptional sentence. That qualitative judgment is not a "fact" within the coverage of *Apprendi*. See *Apprendi*, 530 U.S. at 482-483 (noting the "novelty of a legislative scheme that removes the jury from the determination of *a fact* that, if found, exposes the criminal defendant to a penalty exceeding the [otherwise-applicable] maximum") (emphasis altered); *id.* at 483 ("practice must at least adhere to the basic principles undergirding the requirements of trying to a jury *all facts* necessary to constitute a statutory offense") (emphasis added); *id.* at 490 ("[o]ther than the fact of a prior conviction, any *fact* that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.") (emphasis added).

The Washington Sentencing Reform Act authorizes the court to "impose a sentence outside the standard sentence range" when the court determines "that there are substantial and compelling reasons justifying an exceptional sentence." Wash. Rev. Code § 9.94A.120(2). That conclusion is ultimately a qualitative judgment rather than a factual finding. After the judge determines that the facts that might support a departure have not already been taken into account in setting the presumptive range, see *Fisher*, 739 P.2d at 686, the judge must assess, taking into consideration the purposes of the Sentencing Reform Act, whether the overall circumstances are sufficiently "atypical" that they

provide "substantial and compelling" reasons "justifying" an "exceptional" sentence. Wash. Rev. Code § 9.94A.120(2); *Wash. Guidelines Manual* § 9.94A.390, comment. In so doing, the sentencing judge is making an intangible evaluation of the nature and significance of particular facts.[3]

Although the sentencing court must support its judgment that an exceptional sentence is justified with factual findings, those findings alone do not authorize the higher punishment. The Act makes clear that the determination whether substantial and compelling reasons justify an exceptional sentence is a discretionary one. The Act provides that the sentencing court "may consider" the listed aggravating circumstances and a wide range of unspecified factors "in the exercise of its discretion to impose an exceptional sentence." Wash. Rev. Code § 9.94A.390. See *State* v. *Perez*, 847 P.2d 532, 535 (Wash. Ct. App.) (noting that departure authority preserves "judicial discretion to fashion individualized sentences when the facts of a particular case demand it"), review denied, 863 P.2d 74 (Wash. 1993). The judge need not conclude that there are "substantial and compelling reasons justifying an exceptional sentence" merely because he finds a listed aggravating circumstance. The judge may still determine that the other circumstances of the case and the purposes of the Act lead to the conclusion that a sentence within the standard range is appropriate. See *State* v. *Armstrong*, 723 P.2d 1111, 1114 (Wash. 1986) (weighing aggravating and mitigating factors in reviewing whether exceptional

---

[3] Recognizing that the determination whether "substantial and compelling" reasons "justify[]" an exceptional sentence involves a judgment and not a factual finding, the Washington courts review that determination de novo rather than under a clearly erroneous standard. See *Nordby*, 723 P.2d at 1119. In contrast, appellate courts review the underlying factual findings under the clearly erroneous standard, *Nordby*, 723 P.2d at 1119, and they review whether the exceptional sentence imposed is "clearly excessive or clearly too lenient" under an abuse of discretion standard. Wash. Rev. Code § 9.94A.210(4)(b); *Gore*, 21 P.3d at 277.

sentence was justified). The judge may also find compelling reasons justifying an exceptional sentence based on a group of facts, each of which considered alone would not justify a departure. See *Perez*, 847 P.2d at 535-536. In analyzing such diverse fact patterns, the sentencing court is making the sort of quintessentially discretionary judgments that have long characterized the sentencing process.

2. *Upward departure determinations are fundamentally different from the factual findings at issue in* Ring

Because an upward departure determination under the Washington guidelines is not conditioned on a factual finding specified by the legislature, petitioner is incorrect that a departure determination is "just like the procedure that this Court invalidated in *Ring*." Br. 17. *Ring*, unlike this case, involved the classic situation in which *Apprendi* is applicable —the Arizona legislature made a defendant's exposure to increased punishment contingent on the finding of legislatively specified facts.

In *Ring*, a defendant convicted of capital murder could not legally be sentenced to death unless the judge found one of the aggravating factors enumerated by the Arizona statute. Absent the judge's finding of one of those legislatively specified facts, the highest penalty that could legally be imposed was life imprisonment. In that circumstance, life imprisonment, rather than the death penalty, was the true statutory maximum for murder without an aggravating factor.

Here, in contrast, there is no legislatively specified set of facts one of which must be found before a defendant can be sentenced above the presumptive sentencing range. The Washington statute leaves room for judgment by the sentencing court that an unspecified fact exists that makes the case atypical. And there is no legislatively specified set of facts that *mandates* exposure to an increased sentence. In contrast to *Ring*, where the legislature itself had made the

judgment about what facts justified a higher punishment, and the judge was only finding whether one of those facts existed in the particular case, here, the determination whether a particular set of circumstances warrants a longer-than-usual sentence requires the judge to exercise his own judgment that the case involves substantial and compelling reasons justifying an exceptional sentence.

Put differently, in *Ring*, "Arizona's enumerated aggravating factors operate[d] as 'the functional equivalent of an element of a greater offense.'" *Ring*, 536 U.S. at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19); see *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 111-112 (2003) (plurality opinion) ("The underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances.'"). The Arizona legislature itself had created a hierarchy of crimes that were differentiated by specific factual showings and that carried different punishments. There is no comparable hierarchy of crimes created by the Washington guidelines system. The many and unspecified bases for upward departure are not "elements" in an infinite series of "greater offenses" than the crimes subject to sentencing in the standard range.

3. *Upward departure determinations closely resemble the traditional role of judges in sentencing*

As this Court has noted in describing the departure process under the federal Sentencing Guidelines, a court's decision to depart from the Washington guidelines "embodies the traditional exercise of discretion by a sentencing court." *Koon* v. *United States*, 518 U.S. 81, 98 (1996); see *Perez*, 847 P.2d at 535. Upward departure determinations thus closely resemble the judicial role in sentencing that this Court approved in *Williams* and has repeatedly reaffirmed, including in *Apprendi*, 530 U.S. at 481.

The determinations made by sentencing judges under the Washington guidelines system differ from the *Williams* paradigm in certain respects. The legislature has to some degree constrained the judge's exercise of his judgment about what level of punishment is appropriate. The legislature has identified a narrower range within the broad range otherwise allowed by law that the judge must use as a starting point in selecting the appropriate sentence. And the legislature has required the judge to stay within that range unless he makes a judgment that substantial and compelling reasons make the case atypical enough to justify departure from that range. But not every limitation on the discretion of the sentencing court triggers the procedural requirements of *Apprendi*. *Apprendi*'s requirements apply only when the legislature has specified that one or more identified facts are necessary to authorize the judge to impose a higher punishment. See pp. 14-15, *supra*. *Apprendi*'s requirements do not apply when, as in this case, the legislature has left the judgment about which facts justify a more serious punishment with the sentencing judge, where that judgment has traditionally rested.

4. *Allowing judges to make departure determinations based on their own fact-finding does not undermine the constitutional values protected by* Apprendi

Petitioner makes three policy arguments to justify applying *Apprendi*'s procedures to upward departure determinations, but each of those arguments is mistaken. First, petitioner incorrectly contends that *Apprendi* requires that legislatures "treat every fact they deem essential to a given prison term with equal gravity." Br. 21. *Apprendi* does not impose a requirement of that breadth. The legislature may specify many effects that a certain fact shall have on punishment without triggering *Apprendi*'s requirements. Under *Harris*, the legislature may constitutionally assign to the

sentencing judge a factual finding that requires the judge to impose a certain minimum punishment. See 536 U.S. at 568-569. If the legislature prescribes that the minimum punishment triggered by the factual finding is the maximum punishment allowed by law, then that factual finding, made by the sentencing judge by a preponderance of the evidence, will dictate the precise extent of the defendant's punishment. And *Apprendi* itself indicates that the legislature may require that a certain fact mitigate the available punishment to a specified degree without providing a jury determination of that fact. See 530 U.S. at 491 n.16.

More fundamentally, the Washington legislature did not deem the facts that supported the departure decision here to be "essential" to the level of the defendant's punishment. The sentencing judge could have determined that a departure was justified without finding those facts or any other legislatively specified facts—the judge was free to rely on his own discretion in deciding which facts were decisive on the departure issue. And the factual findings alone were not sufficient to authorize the departure; what authorized the departure was the sentencing court's judgment that those facts—considered in light of all the circumstances, the presumptive sentencing range, and the purposes of the Sentencing Reform Act—provided substantial and compelling reasons justifying an exceptional sentence.

Second, petitioner contends that *Apprendi* is "designed to ensure that any finding that subjects a defendant to an additional loss of liberty must be made beyond a reasonable doubt." Br. 11. That contention too is mistaken. Factual findings made by the sentencing judge by a preponderance of the evidence, while exercising his discretion to impose sentence within the range specified by statute, can subject a defendant to a significantly greater loss of liberty than the defendant would have suffered absent those findings. Fac-

tual findings that trigger a mandatory minimum sentence can have the same effect.

To the extent that petitioner means that any factual finding must be made by a jury beyond a reasonable doubt if, by legislative mandate, the finding increases a defendant's maximum exposure, see *Apprendi*, 530 U.S. at 490, 494, that principle is honored in Washington's system. The findings that by law are necessary and sufficient to expose the defendant to the prescribed statutory maximum are the elements of the offense. The responsibility for finding the defendant guilty of those elements, and thus of the offense whose grade determines the sentencing range, rests with the jury.

Third, petitioner contends (Br. 25) that *Apprendi* is designed to guarantee that someone accused of a crime be able to predict with certainty the maximum punishment to which he is exposed by pleading guilty. That too is not really what *Apprendi* is about. Even when a sentencing judge may make a factual finding that authorizes increased punishment, the law puts the defendant on notice that he will be exposed to the higher punishment if the judge makes the required finding, and the standard guilty plea colloquy makes that consequence explicit. Petitioner, in particular, can make no claim that he was blindsided about the available punishment in this case. Both the plea agreement and the judge at the plea hearing informed petitioner that he could receive a sentence above the presumptive range if the sentencing judge found that compelling reasons justified an exceptional sentence. And, because of the nature of the departure authority, petitioner could not expect that the absence of any particular fact would insulate him from that higher punishment. He thus occupied the same position as a defendant who pleads guilty to a kidnapping offense carrying a maximum sentence of ten years of imprisonment and is aware that in the ordinary case the judge imposes sentences in the middle of that range, but in factually egregious cases the judge

imposes sentences at or near the maximum term. In that regime, as in the Washington system, the defendant is on notice at the time of his plea that the judge's authority to find facts and exercise discretion will determine how close to the maximum the sentence ultimately will be.

C. Applying *Apprendi* To Upward Departures Under The Washington System Would Raise Questions About The Extent To Which *Apprendi* Applies To Other Guidelines Systems

Many guidelines systems have upward departure provisions similar to those in the Washington system. See American Law Institute, Model Penal Code: Sentencing Report 52, 55-56 (2003) (*ALI Report*) (available at *www.ali.org* under ALI Projects Online). For example, under the United States Sentencing Guidelines (Guidelines), a sentencing judge may impose a sentence above the guidelines range if the judge finds "that there exists an aggravating * * * circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. 3553(b)(1) (as amended Apr. 30, 2003). Like the Washington system, the Guidelines provide a list of factors that may warrant departure from the presumptive sentencing range but also expressly authorize the court to depart upward based on "a circumstance that the Commission has not identified in the Guidelines." Guidelines § 5K2.0(a)(2) (as amended Oct. 27, 2003).

A holding that *Apprendi* applies to the departure determination in this case would raise the question whether *Apprendi* also applies to departure determinations in other guidelines systems. Even more substantial questions would arise if the Court rules that *Apprendi* applies here based on petitioner's theory that the statutory maximum for purposes of *Apprendi* is the punishment that would be imposed

without any findings of fact other than the "'facts reflected in the jury verdict alone' or the guilty plea alone." Br. 17 (quoting *Apprendi*, 530 U.S. at 483). If the "facts reflected in the jury verdict alone" are the elements of the offense, petitioner's theory would mandate the application of *Apprendi* to any facts, other than the offense elements, that increase the defendant's punishment.

Such a rule would have profound consequences for the federal Guidelines. As explained more fully below, facts other than the elements of the offense enter into almost all of the calculations under the Guidelines, beginning with the most basic calculations for determining the offender's presumptive sentencing range. A decision in favor of petitioner could thus raise a serious question about whether *Apprendi* applies to myriad factual determinations under the Guidelines.

1. *The federal Sentencing Guidelines operate differently from the Washington system*

There are significant distinctions between the Washington system and the federal Guidelines that might justify treating them differently for purposes of *Apprendi*.

Most obviously, unlike the Washington system, the federal Guidelines are not enacted by a legislature but are promulgated by the Sentencing Commission, "an independent commission in the judicial branch of the United States." 28 U.S.C. 991(a); see *Mistretta* v. *United States*, 488 U.S. 361, 385 (1989). The Guidelines are thus not statutes but sentencing rules, the unique product of a special and limited delegation of authority to the Commission. "Congress granted the Commission substantial discretion in formulating guidelines." *Id.* at 377. Because Congress entrusted to the Commission the specification of the numerous facts that authorize differing punishments under the Guidelines, there is a strong argument that the Guidelines do not implicate the

concerns addressed by *Apprendi*. As described above, those concerns arise only when the legislature itself dictates the facts that control a defendant's increased exposure to punishment, thereby effectively creating enhanced crimes. See pp. 14-15, *supra*. There is thus good reason to conclude that the Guidelines "do not * * * establish[] minimum and maximum penalties" for crimes. *Mistretta*, 488 U.S. at 396.

Another significant difference between the Washington system and the federal Guidelines also suggests that the federal Guidelines do not establish statutory maxima for criminal offenses. The Washington system sets standard sentencing ranges based on the "actual crime of conviction" (and the defendant's criminal history). See *Wash. Guidelines Manual* § 9.94A.320 and comment. In the federal system, in contrast, the offense of conviction does not dictate a defendant's sentencing range. Instead, the district judge makes a wide variety of factual determinations taking into account not only the conduct that constitutes the offense but all of the defendant's conduct relevant to the offense. Those determinations result in an offense level, which, along with the defendant's criminal history score, produces the presumptive sentencing range. See *Nichols* v. *United States*, 511 U.S. 738, 740 n.3 (1994).

Although a defendant's offense of conviction determines the offense guideline that a court must initially consult, see Guidelines §§ 1B1.1(a) and 1B1.2(a), a cross-reference may require use of a different offense guideline if the underlying conduct so justifies. *E.g.*, *id.* § 2B3.1(c). The applicable guideline then prescribes a base offense level, which is adjusted up or down by specific offense characteristics, relating to the way in which the offense was carried out (*e.g.*, whether a weapon was used during a drug offense (*id.* § 2D1.1.(b)(1))). The offense level may be further modified based on the nature of the victim, the defendant's role in the

offense, and whether the defendant obstructed justice. *Id.* Ch. 3.

In making all of those adjustments to the offense level, the Guidelines require the sentencing court to consider conduct that is part of the "real" offense (*i.e.*, the defendant's actual conduct), even if not part of the charged offense of conviction. See Guidelines Ch. 1, Pt. A, intro. comment. 4(a) (Guidelines embody a "charge offense system" with a "significant number of real offense elements"). The "relevant conduct" guideline provides that, in determining a defendant's guidelines range, the court must consider "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant" and "all reasonably foreseeable acts and omissions" of his confederates "that occurred * * * in preparation for [the] offense, or in the course of attempting to avoid detection or responsibility for that offense." *Id.* § 1B1.3(a)(1). In addition, for offenses for which the Guidelines "require grouping of multiple counts"—drug offenses, for example—"relevant conduct" includes all acts for which the defendant could be held responsible "that were part of the same course of conduct or common scheme or plan as the offense of conviction." *Id.* § 1B1.3(a)(2). Relevant conduct enters into the calculation of the offense level from the earliest stage —even the base offense level may vary depending on facts about how the offense was committed that are not elements of the offense. See *id.* § 1B1.3(a).

Thus, the presumptive sentencing range under the Guidelines is not derived from the offense of conviction; rather, it flows from a multitude of factors that have typically been considered in sentencing, such as the defendant's "role in the offense, the presence of a gun, or the amount of money actually taken." Guidelines Ch. 1, Pt. A, intro. comment. 4(a). Because the sentencing range under the Guidelines does not follow from the offense of conviction, the top of the

range does not function as a "statutory maximum" for the offense.

Rather than set statutory maxima, the Guidelines seek to channel sentencing judges' exercise of discretion within the statutory maxima prescribed by Congress in the United States Code. The Guidelines "do no more than fetter the discretion of sentencing judges to do what they have done for generations—impose sentences within the broad limits established by Congress." *Mistretta*, 488 U.S. at 396. The Guidelines direct judges to consider factors that sentencing judges have always had discretion to consider and establish presumptive sentencing ranges based on those factors. See *Watts*, 519 U.S. at 152; *Witte*, 515 U.S. at 402. Indeed, in formulating the Guidelines, the Sentencing Commission canvassed prior sentencing practice and attempted to identify and to assign weights to all the factors that judges traditionally used in determining appropriate sentences. See United States Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 16-17 (1987). Because it was not possible to identify and include in the Guidelines all the factors that might appropriately bear on sentencing in a particular case, the Commission also included a flexible departure authority. *Id.* at 17; Guidelines Ch. 1, Pt. A, intro. comment. 4(b). There is good reason to conclude that the Guidelines are not subject to *Apprendi*, in which the Court reaffirmed the authority of "judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute." 530 U.S. at 481 (citing *Williams*, 337 U.S. at 246).

2. A decision invalidating Washington's departure mechanism would raise questions about the federal Sentencing Guidelines' constitutionality

It is nonetheless not certain that this Court would ultimately conclude that the differences between the Washing-

ton system and the federal Guidelines are of constitutional magnitude. The Sentencing Commission "is fully accountable to Congress, which can revoke or amend any or all of the Guidelines as it sees fit." *Mistretta*, 488 U.S. at 393-394. Congress has in fact exercised its authority to amend the Guidelines. See PROTECT Act, Pub. L. No. 108-21, § 401(b), (g), and (*i*), 117 Stat. 668-669, 671-673 (Apr. 30, 2003). Moreover, the Sentencing Commission exercises authority delegated by Congress, and the Guidelines are binding legislative rules. See *Stinson* v. *United States*, 508 U.S. 36, 42, 44-45 (1993). Thus, it is not entirely clear that the administrative nature of the Guidelines will insulate them from *Apprendi*.

In addition, although Guidelines sentencing ranges cannot be viewed as establishing statutory maxima, it is possible to identify the maximum punishment that would be permitted under the Guidelines if one could consider only those facts constituting the elements of a particular offense (and the defendant's criminal history). To do so would involve ignoring most of the Guidelines' provisions and applying the Guidelines differently from the way they were intended to work. But that artificially constructed sentencing range could theoretically be treated as establishing a statutory maximum for purposes of *Apprendi*. If this Court pursued that approach, however, almost all the factual findings required to apply the Guidelines according to their terms would be covered by *Apprendi*. As explained more fully below, that would create enormous practical problems for application of the Guidelines and could lead to their abandonment.

D. Application Of *Apprendi* To Guidelines Determinations Would Undermine Sentencing Reform Efforts

If this Court were to hold that *Apprendi* applies to the many factual determinations made under sentencing guidelines systems, the use of such systems would become cumbersome and potentially harmful to criminal defendants. Guidelines systems might well prove to be unworkable. Legislatures would then be forced to return either to determinate sentences that do not allow room for individualization of punishment or to indeterminate sentencing systems, which have serious shortcomings, including unjustified disparities in the treatment of similarly situated offenders.

1. *Applying* Apprendi *to guidelines sentencing would create significant problems*

There would be significant administrative difficulties if the myriad facts that enter into guidelines calculations had to be found by juries beyond a reasonable doubt (and, in federal cases, charged in indictments, see *United States* v. *Cotton*, 535 U.S. 625, 627 (2002)). Prosecutors would have to anticipate most guidelines adjustments and investigate the facts relevant to them before indicting, and juries would have to work through complex special verdict forms covering multiple issues.

The number of special findings that might be required would be enormous. For example, the basic federal sentencing guideline for robbery requires more than a dozen different factual determinations about the details of the offense, such as whether the property of a financial institution or post office was involved; whether a firearm was possessed, used, or discharged; whether people were injured and to what degree; and how great a financial loss was involved. See Guidelines § 2B3.1. After those factual findings are made, the Guidelines require a half dozen or more determinations about the victim, such as whether the defendant knew or should have known that the victim was vulnerable. See *id.* Ch. 3, Pt. A. The Guidelines then require another half dozen or so determinations about the defendant's role in the offense, such as whether he played a supervisory or leadership role, and, if so, to what degree, and whether the

defendant abused a position or trust or used a special skill in committing or concealing the offense. *Id.* Ch. 3, Pt. B. Further factual determinations are also required, such as whether the defendant obstructed justice and whether he recklessly endangered someone in seeking to avoid arrest. *Id.* Ch. 3, Pt. C.

Some of those findings would have to be made at a sentencing proceeding separate from the underlying trial because they involve conduct occurring at or after trial, such as perjury. Indeed, in the federal system, reliance on post-indictment conduct might have to be abandoned altogether since it is difficult to see how that conduct could be charged in the indictment. Even when bifurcated proceedings were not required by the nature of the facts involved, bifurcation might be thought advisable (even if not constitutionally required) out of fairness to the defendant. Otherwise, the jury's decision on guilt might be skewed by consideration of facts that bear only on the appropriate punishment. As this Court has noted, "[a] defendant might not, for example, wish to simultaneously profess his innocence of a drug offense and dispute the amount of drugs allegedly involved." *Monge* v. *California*, 524 U.S. 721, 729 (1998). But the proliferation of bifurcated proceedings would impede the efficient use of judicial resources.

Other problems would also arise. Jurors might engage in compromise verdicts or nullification in an effort to control the sentence, even if they were not told of the sentencing consequences of their actions. And appellate review of guidelines determinations would be sharply restricted, thus depriving the system of the "greater degree of consistency in sentencing" that appeals can produce. See *United States* v. *DiFrancesco*, 449 U.S. 117, 143 (1980).[4]

[4] Appeals by the defendant would probably be limited to the deferential review given to the jury's finding of guilt in criminal cases. See *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979) (inquiry is whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"). Appeals by the government of jury "acquittals" on guidelines factors would probably be barred by double jeopardy principles. Cf. *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 111-112 (2003) (plurality opinion).

2. *The undermining of guidelines systems would have substantial costs for sentencing reform*

The overall burdens on the judicial system of applying *Apprendi* would likely push guidelines systems past the breaking point. If so, legislatures would be forced to abandon guidelines as a sentencing option. That would be an extremely unfortunate and unwarranted result.

Guidelines systems were developed in the 1980s and 1990s in response to problems with the indeterminate sentencing regimes that dominated sentencing in the United States for most of the twentieth century. One of the most serious criticisms of indeterminate sentencing was that it resulted in significant disparities in the sentences imposed on similarly situated defendants, including disparities based on race, ethnicity, and gender. See Arthur W. Campbell, *Law of Sentencing* § 1:3, at 9-10 (2d ed. 1991). Critics not only assailed the lawlessness of indeterminate sentencing, but noted that it obscured the actual punishments being imposed, provided no mechanism to implement a systemic sentencing policy, and did not allow legislatures to control the need for prison resources. See *id.* at 10-12; *ALI Report* 64-65, 66-68, 72 & n.90, 74-75.

Indeterminate sentencing had once represented a valuable reform in response to the determinate sentences mandated for felony offenses early in the nation's history. Determinate sentencing does not allow for any individualization of punishment, despite major differences in the way crimes are committed. The nation's experience with determinate sentences showed that, in sentencing, "justice gen-

erally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U.S. 51, 55 (1937). Guidelines systems offer a mechanism for minimizing the disparities and discrimination inherent in indeterminate sentencing while providing the proportionality lacking in determinate sentencing.

Although guidelines systems have generated some criticism, most of that criticism has been directed at the federal guidelines and their particular characteristics; state guidelines systems have generally been favorably received. See *ALI Report* 47-48, 115. And guidelines systems (particularly those, like Washington's, based on the model developed in Minnesota in 1980, *id.* at 52) have been recognized as the most promising means to eliminate the problems associated with indeterminate sentencing without sacrificing individualized punishment. See *id.* at 46-48.

In addition to the federal government, fifteen States have adopted guidelines systems, and several more States are considering such systems. *ALI Report* 47. The guidelines approach has been endorsed by the American Bar Association and the Bureau of Justice Assistance of the United States Department of Justice. See *id.* at 47 n.59. A guidelines system is also the leading contender for the centerpiece of the ALI's planned revision to the sentencing provisions of the Model Penal Code. See *id.* at 4. Guidelines systems are thus a prominent and expanding component of legislative efforts to achieve order and fairness in sentencing. Protection of the constitutional values underlying *Apprendi* does not require the Court to call into doubt the constitutionality of that promising sentencing reform.

CONCLUSION

The judgment of the Washington Court of Appeals should be affirmed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
CHRISTOPHER A. WRAY
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
MATTHEW D. ROBERTS
Assistant to the Solicitor General
NINA GOODMAN
Attorney

JANUARY 2004

(13)

Supreme Court, U.S.
FILED
JAN 23 2004
OFFICE OF THE CLERK

No. 02-1632

In the
Supreme Court of the United States

RALPH HOWARD BLAKELY, JR.,
Petitioner,

v.

STATE of WASHINGTON,
Respondent.

On Writ of Certiorari to the Washington Court of Appeals, Division III

BRIEF OF ALABAMA, DELAWARE, FLORIDA, HAWAII, ILLINOIS, NEBRASKA, OREGON, TEXAS, UTAH, AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

William H. Pryor Jr.
Attorney General

Kevin C. Newsom
Solicitor General

Of Counsel

Nathan A. Forrester
BRADLEY ARANT ROSE & WHITE LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203-2104
(205) 521-8604

Michael B. Billingsley
Deputy Solicitor General
Counsel of Record *

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130-0152
(334) 353-3915, 242-7495*

January 23, 2003

(Additional counsel for amici curiae are listed inside the front cover.)

M. JANE BRADY
ATTORNEY GENERAL
STATE OF DELAWARE
Department of Justice
820 N. French Street
Wilmington, DE 19801

CHARLES J. CRIST, JR.
ATTORNEY GENERAL
STATE OF FLORIDA
The Capital
Tallahassee, Florida 32301

MARK J. BENNETT
ATTORNEY GENERAL
STATE OF HAWAII
425 Queen Street
Honolulu, Hawaii 96813

LISA MADIGAN
ATTORNEY GENERAL
STATE OF ILLINOIS
100 W. Randolph Street
12th Floor
Chicago, Illinois 60601

JON BRUNING
ATTORNEY GENERAL
STATE OF NEBRASKA
P.O. Box 98920
Lincoln, NE 68509

HARDY MYERS
ATTORNEY GENERAL
STATE OF OREGON
1162 Court St. N.E.
Salem, Oregon 97301

GREG ABBOTT
ATTORNEY GENERAL
STATE OF TEXAS
P.O. Box 12548
Austin, Texas 78711-2548

MARK L. SHURTLEFF
ATTORNEY GENERAL
STATE OF UTAH
236 State Capitol
Salt Lake City, Utah 84114

JERRY W. KILGORE
ATTORNEY GENERAL
COMMONWEALTH OF
VIRGINIA
900 East Main Street
Richmond, Virginia 23219

QUESTIONS PRESENTED

(Restated)

1. Under the Sixth Amendment, may a state legislature set the maximum sentence for a crime, set a standard sentence for the crime, and then assign the trial court the responsibility to determine whether there are special circumstances that warrant upward departure from the standard sentence to an exceptional sentence that still does not exceed the maximum?

2. Should a federal court defer to a state court's determination whether a state legislature intended to designate a particular factual finding an "element" of the crime, which must be found by the jury, or a "sentencing factor," which may be found by the judge, under the Sixth Amendment?

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
INTEREST OF AMICI CURIAE 1
STATEMENT OF THE CASE 2
A. Washington's sentencing guidelines 3
B. Blakely's conviction and sentence 7
SUMMARY OF ARGUMENT 10
ARGUMENT 11
I. The Sixth Amendment Requires the Jury to Find Only Those Facts That the Legislature Has Deemed Essential to Establish the Maximum Penalty for the Crime. 13
II. Requiring the Jury To Make All Factual Findings That Are a Prerequisite to Final Sentence — Even When Those Findings Cannot Possibly Increase the Maximum Penalty — Eliminates Many of the Advantages Afforded by Structured Sentencing. 15
III. It Makes No Sense To Treat Even Soft Findings — Such as Whether There Is a "Substantial and Compelling" Reason To Depart Upward From the Standard Sentence — as Elements of the Crime That Must Be Found by the Jury. 19
CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Apprendi v. New Jersey, 530 U.S. 466 (2000) ..... passim
Beck v. Washington, 369 U.S. 541 (1962) 21
Eddings v. Oklahoma, 455 U.S. 104 (1982) 21
Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) 21
Foster v. Strickland, 707 F.2d 1339 (11th Cir. 1983) 21
Harris v. United States, 536 U.S. 545 (2002) 14
Hurtado v. California, 110 U.S. 516 (1884) 21
Lockett v. Ohio, 438 U.S. 586 (1978) 21
State v. Ammons, 713 P.2d 719 (Wash. 1986) 6
State v. Blakely, 47 P.3d 149 (Wash. App. 2002) 8, 9
State v. Brown, 940 P.2d 546 (Wash. 1997) 20
State v. Dilts, 2003 WL 22966264, at *2 (Or. Dec. 18, 2003) 3, 18
State v. Givens, 544 N.W.2d 774 (Minn. 1996) 17
State v. Gore, 21 P.3d 262 (Wash. 2001) 10
State v. Grewe, 813 P.2d 1238 (Wash. 1991) 6
State v. Sanchez, 848 P.2d 208 (Wash. App. 1993) 6
Zant v. Stephens, 462 U.S. 862 (1983) 21

Statutes

2002 Md. Laws 26 20
42 Pa. Consol. Stat. § 9711(c)(1) (West 1998) 20

Ala. Code § 13A-5-46 20
Ark. Code Ann § 16-90-804(d) 18
Ark. Code Ann. § 16-90-804 3
Ark. Code Ann. § 16-90-804(a)(1) 18
Ark. Code Ann. § 16-90-804(a)(2)(A) 18
Ark. Code Ann. § 5-4-603 (Repl. 1997) 20
Cal. Penal Code § 190.3 (West 1999) 20
Conn. Gen. Stat. § 53a-46a (2001) 20
Fla. Stat. ch. 921.0016 3
Fla. Stat. ch. 921.0016(1)(b) 18
Fla. Stat. ch. 921.0016(1)(c) 18
Fla. State. Ch 921.0016(3) 18
Kan. Stat. § 21-4624 (1995) 20
Mich. Comp. Laws Ann. § 769.34 3
Mich. Comp. Laws Ann. § 769.34(3) 17
Mich. Comp. Laws. Ann § 769.34(3)(a), (b) 17
Minn. Stat. Ann § 244.10 3
Minn. Stat. Ann § 244.10, subd. 2 17
Miss. Code Ann. § 99-19-101 (1999) 20
Mo. Rev. Stat. § 565.030, 565.032, 565.035 (West 1999) 20
N.C. Gen. Stat. § 15A-1340.16(b) 3, 17
N.C. Gen. Stat. § 15A-1340.16(c) 17
N.C. Gen. Stat. § 15A-1340.16(d)(20) 17

N.C. Gen. Stat. § 15A-2000(b) (1995) 20
N.H. Rev. Stat. Ann. § 630:5 (1996) 20
N.J. Stat. Ann. § 2C:11-3 (West 1995) 20
N.M. Stat. Ann. § 31-20A-2 (1978) 20
N.Y. Crim. Pro. Laws § 400.27(11)(a) (McKinney 1995) 20
Nev. Rev. Stat. 175.552, 175.554, 175.556 (1995) 20
Ohio Rev. Code Ann. § 2929.03(D)(2) (West 1996) 20
Okla. Stat. Ann. Tit. 21 § 701.11 (West 1983) 20
Tenn. Code Ann. § 39-13-204(g)(1) (1989) 20
Utah Code Ann. § 76-3-207(b) (1953) 20
Wash. Rev. Code Ann. § 10.95.060(3) (2002) 20
Wash Rev. Code § 9.94A.210(4) 6
Wash Rev. Code § 9.94A.390(2)(h)(ii), (iii) (1997) 9
Wash. Rev. Code § 9.94A.535(1) 6
Wash. Rev. Code § 9.94A.535(2) 6
Wash. Rev. Code § 9.94A 3
Wash. Rev. Code § 9.94A.010 3
Wash. Rev. Code § 9.94A.120(2) 6
Wash. Rev. Code § 9.94A.390(2)(a) (1997) 9
Wash. Rev. Code § 9.94A.515 ..... 5, 8
Wash. Rev. Code § 9.94A.520 5
Wash. Rev. Code § 9.94A.525 5
Wash. Rev. Code § 9.94A.530(2) 9

Wash. Rev. Code § 9.94A.535 6
Wash. Rev. Code § 9A.20.021 ..... 4, 5, 13
Wash. Rev. Code § 9A.20.021(1)(a) 8
Wash. Rev. Code § 9A.20.021(1)(b) 8
Wash. Rev. Code § 9A.40.020(2) 8

Rules

Or. Admin. R. 213-008-0001 ..... 3, 18
Or. Admin. R. 213-008-0002 18

INTEREST OF AMICI CURIAE

The States of Alabama, Delaware, Florida, Hawaii, Illinois, Nebraska, Oregon, Texas, Utah, and Virginia submit this brief as amici curiae under Supreme Court Rule 37.4, in support of the respondent State of Washington. At issue in this case is whether Washington's sentencing guidelines comply with the Sixth Amendment, as explicated in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Numerous States have adopted structured sentencing schemes similar to Washington's. At the initiative of Attorney General Pryor, an Alabama commission has developed a set of standardized sentencing guidelines, which it intends to submit to the Alabama legislature at the beginning of the next legislative session.

These various guidelines all seek to eliminate both actual and perceived disparities in criminal sentencing by making it more regular and more transparent. Amici share an interest in seeing that *Apprendi* is not interpreted so inflexibly as to frustrate achievement of these goals. Amici also share an interest in seeing that *Apprendi* is not reduced to a formalistic trap for legislatures whose penological aims are constitutionally licit but whose draftsmanship does not happen to fit a particular statutory form.

As long as a State does not attempt a blatant end-run around *Apprendi* — e.g., by re-characterizing traditional elements as sentencing factors and prescribing a wide range of sentences for the trial court to choose from — the federal courts should defer to a state court's determination of what constitutes an "element" and what constitutes a "sentencing factor" for a particular crime. Otherwise *Apprendi* could spell the demise of many state sentencing regimes, including

standardized guidelines like Washington's. It would also adversely affect capital sentencing statutes, like Alabama's, that provide for additional findings before imposing a death sentence. None of these regimes evinces any nefarious legislative intent to siphon traditional Sixth Amendment fact-finding responsibility away from the jury. They are part of a long tradition in this country of dividing sentencing responsibility between the jury and judge, which *Apprendi* acknowledged and purported not to disturb. Amici therefore urge this Court to affirm the ruling of the Washington Court of Appeals and not to extend the rule of *Apprendi* any further.

STATEMENT OF THE CASE

Petitioner Ralph Howard Blakely, Jr. pleaded guilty in Washington state court to second-degree kidnapping and second-degree assault. Under Washington law, both crimes are Class B felonies. By statute, a Class B felony carries a maximum sentence of ten years (120 months) imprisonment and a maximum fine of $20,000. Under Washington's sentencing guidelines, Blakely faced a standard sentence of 49-53 months for the kidnapping charge and a standard sentence of 12-14 months for the assault charge.

The trial court found two circumstances, however, that in its view warranted an upward departure from the standard sentence. First, in committing the offense, Blakely manifested deliberate cruelty by confining his wife in a coffin-like box. Second, he threatened his wife in the presence of their thirteen-year-old son, manifesting deliberate cruelty toward or intimidation of a minor child in a domestic violence situation. Accordingly, as authorized by the guidelines,

the trial court imposed an "exceptional sentence" of 90 months on the kidnapping charge, to run concurrently with a standard sentence of 14 months on the assault charge. Although the 90-month sentence imposed is well below the legislatively-authorized 120-month maximum for a Class B felony, Blakely contends that his "exceptional sentence" violates the Sixth Amendment.

A. Washington's sentencing guidelines

Washington's criminal sentencing process is governed by its Sentencing Reform Act (SRA).[1] Like many state sentencing guidelines[2] — and indeed like the U.S. sentencing guidelines — the SRA prescribes a standardized system by which judges determine a sentence within a range set by statute. The SRA was designed to "make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate" judicial sentencing discretion.[3] Washington enacted the SRA in 1981, long before this Court's decision in *Apprendi v. New Jersey*[4] clarified the constitutional significance of designating a maximum sentence for a particular crime.

---

[1] Wash. Rev. Code § 9.94A.

[2] *See, e.g.*, Ark. Code Ann. § 16-90-804; Fla. Stat. ch. 921.0016; Mich. Comp. Laws Ann. § 769.34; Minn. Stat. Ann § 244.10; N.C. Gen. Stat. § 15A-1340.16(b); *State v. Dilts*, 2003 WL 22966264, at *2 (Or. Dec. 18, 2003) ("Under [Oregon's] guidelines, a sentencing judge may impose a sentence that is an upward or downward departure from the presumptive sentence for a crime on finding 'substantial and compelling reasons' that justify imposing such a departure."), *citing* Or. Admin. R. 213-008-0001.

[3] Wash. Rev. Code § 9.94A.010.

[4] 530 U.S. 466 (2000).

Washington Revised Code Section 9A.20.021 establishes the maximum sentences for each type of crime:

> (1) Felony. Unless a different maximum sentence is specifically established by statute, no person convicted of a classified felony shall be punished by confinement or fine exceeding the following:
>
> (a) For a class A felony, by confinement in a state correctional institution for a term of life imprisonment, or by a fine in an amount fixed by the court of fifty thousand dollars, or by both such confinement and fine;
>
> (b) For a class B felony, by confinement in a state correctional institution for a term of ten years, or by a fine in an amount fixed by the court of twenty thousand dollars, or by both such confinement and fine;
>
> (c) For a class C felony, by confinement in a state correctional institution for five years, or by a fine in an amount fixed by the court of ten thousand dollars, or by both such confinement and fine;
>
> (2) Gross misdemeanor. Every person convicted of a gross misdemeanor defined in Title 9A [of the Washington Revised Code] shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than one year, or by a fine in an amount fixed by the court of not more than five thousand dollars, or by both such imprisonment and fine.

> (3) Misdemeanor. Every person convicted of a misdemeanor defined in Title 9A [of the Washington Revised Code] shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than ninety days, or by a fine in an amount fixed by the court of not more than one thousand dollars, or by both such imprisonment and fine.

The guidelines of the SRA operate to determine the convict's sentence *within these ranges.* Under no circumstances may a trial court impose a sentence in excess of the maximum set out in section 9A.20.021.

The SRA structures the discretion of the trial judge by prescribing a two-stage process for determining a convict's sentence. During the first stage, the trial court determines the standard sentencing range for the convict. The standard range is a function of two variables: the offense- seriousness level and the offender score.[5] "The offense seriousness level is determined by the offense of conviction."[6] The offender score is determined primarily by the convict's past criminal history.[7]

During the second stage, the trial court determines whether it has a "substantial and compelling" reason to depart upward or downward from the standard range and impose an "exceptional sentence." The SRA provides a list of "aggravating" circumstances" that will

---

[5] Wash. Rev. Code §§ 9.94A.515, 9.94A.525.

[6] Wash. Rev. Code § 9.94A.520. Table 2 of the SRA, codified at Wash. Rev. Code § 9.94A.515, designates the seriousness level for every crime in Washington, ranging from I (least serious) to XVI (most serious).

[7] Wash. Rev. Code § 9.94A.525.

justify an upward departure[8] and a list of "mitigating circumstances" that will justify a downward departure.[9] The SRA makes clear that these lists are "illustrative only and ... not intended to be exclusive reasons for an exceptional sentence."[10] The "court is allowed to impose a sentence outside the standard range, either higher or lower, as long as it finds 'considering the purpose of [the SRA] that there are substantial and compelling reasons justifying an exceptional sentence.'"[11] The only limitation on the court's discretion — excluding, of course, an inability to sentence above the statutory maximum — is that the "substantial and compelling" reason may not duplicate an element of the crime."[12]

Both upward and downward departures are subject to appeal: the former by the defendant and the latter by the State.[13] "To reverse a sentence outside the sentence range, the reviewing court must find (a) [e]ither that the reasons supplied by the sentencing judge are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient."[14]

---

[8] Wash. Rev. Code § 9.94A.535(2).

[9] Wash. Rev. Code § 9.94A.535(1).

[10] Wash. Rev. Code § 9.94A.535.

[11] *State v. Ammons*, 713 P.2d 719, 723 (Wash. 1986) (citing former Wash. Rev. Code § 9.94A.120(2)).

[12] *State v. Grewe*, 813 P.2d 1238, 1240 (Wash. 1991).

[13] *State v. Sanchez*, 848 P.2d 208, 209 (Wash. App. 1993); Wash Rev. Code § 9.94A.210(4).

[14] *Sanchez*, 848 P.2d at 210.

B. Blakely's conviction and sentence

In July 1995, petitioner Ralph Howard Blakely, Jr. broke into the Spokane, Washington home of his estranged wife, Yolanda, and threatened to poison her and their children or to kidnap them. Yolanda filed for divorce. Sometime thereafter, Blakely built a coffin-like box at his home in Montana, big enough to fit his wife.

On October 26, 1998, Blakely put the coffin on the back of his truck and drove to his wife's farm in Washington. Outside at the mailbox, he grabbed Yolanda, threatened to kill her with the knives and guns in his possession, and forced her to crawl into the box. He then drove up to the house and loaded his wife's financial files and computer into the back of the truck.

While Blakely was still at the home, his thirteen-year-old son Ralphy arrived from school. Blakely threatened his son with a filet knife and ordered Ralphy to follow the truck in his mother's car. He threatened to shoot Yolanda with a shotgun if Ralphy did not obey him. Later, when they stopped for gas, Ralphy escaped, but Blakely drove off with Yolanda still trapped in the coffin. Blakely drove all night and into the next day toward his home in Montana. From time to time, he would release Yolanda from the coffin and allow her to sit in the cab with her hands tied, while he kept a knife by the steering wheel.

On October 27, 1998, the day after he had kidnapped his wife and put her in the coffin, Blakely reached the home of one of his neighbors in Montana. He imprisoned her, too, but she managed to escape and go to the police. Federal agents apprehended Blakely later that same day.

Blakely was initially charged in state court with two counts of first-degree kidnapping: one for his wife and the other for his son. Under Washington statute, first-degree kidnapping is a Class A felony.[15] As noted, the maximum sentence for a Class A felony is life in prison.[16]

Following jury selection, Blakely agreed to plead guilty to the second-degree kidnapping of his wife, enhanced by his use of a deadly weapon, and to the second-degree assault of his son.[17] Both crimes are Class B felonies under Washington statute and thus carry maximum sentences of ten years (120 months).[18] Under the guidelines, second-degree kidnapping has a seriousness level of V and second-degree assault has a seriousness level of IV.[19] Taking into account Blakely's offender score, the standard sentencing range for the kidnapping offense was 13-17 months.[20] The enhancement for use of a deadly weapon raised the standard range for the kidnapping charge by 36 months.[21] On the kidnapping count, therefore, Blakely faced a standard range of 49-53 months, with a maximum of 120 months. On the assault charge, he faced a standard range of 12-14 months, also with a maximum of 120 months.

The State amended the charging information to reflect the negotiated charges and informed Blakely that the maximum prison term he could receive for each crime was ten years.[22] In the plea agreement, the

[15] Wash. Rev. Code § 9A.40.020(2).
[16] Wash. Rev. Code § 9A.20.021(1)(a).
[17] *State v. Blakely*, 47 P.3d 149, 151 (Wash. App. 2002).
[18] Wash. Rev. Code § 9A.20.021(1)(b).
[19] Wash. Rev. Code § 9.94A.515.
[20] J.A. 63.
[21] J.A. 63.
[22] J.A. 76.

State recommended that Blakely receive concurrent sentences at the high end of the standard sentencing range for his crimes: i.e., 53 months.[23] The plea agreement made clear, however, that the trial court did not have to accept the State's sentencing recommendation and could depart upward from the standard range for each conviction.[24]

The trial court accepted Blakely's plea of guilty. The court found, however, two "substantial and compelling reasons" that in its view warranted upward departure from the standard range for second-degree kidnapping: "(1) [that] Mr. Blakely's conduct during the kidnapping manifested deliberate cruelty to his wife, former RCW 9.94A.390(2)(a) (1997); and (2) [that] the offense involved domestic violence plus deliberate cruelty and commission within sight or sound of the victim's minor child, former RCW 9.94A.390(2)(h)(ii), (iii) (1997)."[25] Accordingly, the trial court "imposed an exceptional sentence of 90 months on the kidnapping charge, to run concurrently with a standard sentence of 14 months on the assault charge"[26] — a sentence well below the 120-month maximum presented by statute.

Blakely contested the court's decision to depart upward. As required,[27] the court then held an evidentiary hearing, at which testimony was presented from the victims and mental health professionals. After the hearing, the court announced that it would not change Blakely's sentence.

On appeal, Blakely argued that the upward departure from the standard sentencing range violated

[23] *Blakely*, 47 P.3d at 154.
[24] J.A. 66.
[25] *Blakely*, 47 P.3d at 157.
[26] *Id* .at 154.
[27] Wash. Rev. Code § 9.94A.530(2).

Apprendi v. New Jersey.[28] Following the Washington Supreme Court's decision in *State v. Gore*,[29] the intermediate court of appeals rejected Blakely's claim. The court reasoned that the "substantial and compelling" reasons found by the trial court "neither increase[d] the maximum sentence nor define[d] separate offenses calling for separate penalties."[30] The court of appeals also reviewed the reasons given by the trial court and found that they afforded adequate justification for upward departure from the standard sentencing range. The court of appeals accordingly affirmed Blakely's conviction and sentence.

The Washington Supreme Court denied review.[31] This Court then granted certiorari to address the *Apprendi* issue raised by Blakely.

SUMMARY OF ARGUMENT

Blakely's sentence of 90 months for second-degree kidnapping did not exceed the statutory maximum of 120 months. Indeed, no matter how "substantial or compelling" its reasons, the trial court could never have sentenced Blakely to more than 120 months as a matter of Washington law. Under *Apprendi*, as long as the sentence that the trial court imposes does not exceed the statutory maximum for the crime, the sentence is valid. The trial court should be entitled to make any factual findings, whether mandated by statute or taken at the court's own initiative, in determining that sentence.

---

[28] J.A. 15.
[29] 21 P.3d 262 (Wash. 2001).
[30] J.A. 19.
[31] J.A. 60.

Blakely's contention to the contrary boils down to the faulty proposition that any mandated factual finding — any factual finding that is a prerequisite to the final sentence — is automatically an element of the crime and must be found by the jury. Not only does this interpretation lack any basis in the text, history, or logic of the Fifth and Sixth Amendments, it raises a host of practical problems, not the least of which is that it would invalidate the sentencing guidelines of several States and the federal government, as well as the capital sentencing regimes of several other States. For all these reasons, Blakely's sentence — and the Washington sentencing guidelines — should be upheld.

ARGUMENT

The rule of *Apprendi* is that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be ... submitted to a jury, and proven beyond a reasonable doubt." 530 U.S. at 476. Blakely does not dispute that the judge in this case did not exceed the statutory maximum for second-degree kidnapping of 120 months. Indeed, he does not dispute that the judge could never have exceeded the statutory maximum, no matter what "substantial and compelling reasons" the judge might have found, because Washington's guidelines do not permit it. Under *Apprendi*, these realities ought to dispose of any constitutional objections.

Nevertheless, Blakely contends that the trial judge violated *Apprendi* by departing upward from the standard sentencing range of 49-53 months to the "exceptional sentence" of 90 months for the crime of second-degree kidnapping. His argument appears to be that, because the judge was not entitled to depart upward without first finding a statutory aggravating

circumstance or some other "substantial and compelling" reason, the judge effectively increased the maximum penalty for the crime. In other words, for purposes of *Apprendi*, the maximum sentence was not 120 months — the maximum that the Washington legislature prescribed in Section 9A.20.021 — but rather 53 months — the upper end of the standard range determined from the seriousness level of Blakely's crime and from Blakely's offender score.

Under this interpretation of *Apprendi*, the "maximum penalty" for a crime — and thus the definition of the elements of a crime — is no longer a matter of legislative intent. If state law mandates any finding of fact before imposition of a given sentence, that finding is deemed to change the "maximum penalty" and thereby becomes an "element" of the crime, even if the sentence does not and cannot exceed the statutory maximum designated by the legislature. All mandatory factual findings would have to be made by a jury. There would no longer be any such thing as a mandatory "sentencing factor" to be considered by a judge.

There are at least three problems with this interpretation of *Apprendi*. First, it displaces legislative prerogative — worse yet, state legislative prerogative — to define the elements of a crime. Second, it pretermits the development of structured sentencing processes that blend the relative aptitudes of judge and jury thereby enhancing accuracy, regularity, and transparency in criminal sentencing. Third, Blakely's misguided interpretation requires even "soft" findings (the existence of a "substantial and compelling" reason for a higher sentence) to be treated as elements of a crime, which is illogical and will wreak

havoc on the indictment process. For all these reasons, Blakely's interpretation of *Apprendi* should be rejected.

I. The Sixth Amendment Requires the Jury to Find Only Those Facts That the Legislature Has Deemed Essential to Establish the Maximum Penalty for the Crime.

"[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed."[32] As charged by the dissenters in *Apprendi*[33] and acknowledged by the majority as well,[34] this rule is prone to manipulation, especially when the statute is unclear as to the "prescribed range of penalties" and what set of facts triggers exposure to them. The statute in this case, however, is not unclear. Washington Revised Code Section 9A.20.021 states in no uncertain terms that the maximum punishment for a Class B felony is "confinement in a state correctional institution for a term of ten years," "a fine in an amount fixed by the court of twenty thousand dollars," or both. Both crimes to which Blakely pleaded guilty are Class B felonies. Washington statutes define the elements of both crimes. By pleading guilty to these crimes, Blakely waived his right to jury disposition of all the factual issues that the Washington legislature deemed essential to establishing 120 months and $20,000 as his maximum penalties.

Blakely's interpretation violates this clear legislative intent. It would treat any finding of fact that is a prerequisite to the final sentence — regardless of how the legislature intended to treat that finding —

---

[32] *Apprendi*, 530 U.S. at 490.
[33] *Id.* at 540-43.
[34] *Id.* at 490 n. 16.

as an element of the crime in question. This interpretation of *Apprendi* may relieve a court of the sometimes vexing interpretive task of distinguishing between "elements" and "sentencing factors,"[35] but it does so at the intolerable expense of usurping legislative prerogative to define the elements.[36] Furthermore, when the statute defining the elements of the crime has been promulgated by a State, the courts of that State should have the prerogative to interpret legislative intent. Unless there is evidence that the State is attempting to evade the dictates of the Sixth Amendment by redefining elements as sentencing factors, federal courts should defer to a state courts' determinations whether a given factual finding is a sentencing factor or an element.

Here, long before *Apprendi* (and thus long before it could have been aware of the consequences of its decision for the issue in this case), the Washington legislature declared in no uncertain terms that the maximum sentences for second-degree kidnapping and second-degree assault would be ten years. As a matter of Washington law, none of the guidelines that the trial court followed in determining Blakely's exact sentence could have altered this statutory maximum. Washington courts have accordingly interpreted the factual findings made by the judge in the course of following the guidelines to be sentencing factors only, even though the findings are mandatory. Absent evidence of constitutional gamesmanship on the part of the State, a state court's interpretation of state law should be entitled to deference.

---

[35] *Harris v. United States*, 536 U.S. 545, 550 (2002).

[36] *Id.* at 550 ("The Constitution permits legislatures to make the distinction between elements and sentencing factors").

II. Requiring the Jury To Make All Factual Findings That Are a Prerequisite to Final Sentence — Even When Those Findings Cannot Possibly Increase the Maximum Penalty — Eliminates Many of the Advantages Afforded by Structured Sentencing.

Blakely's interpretation of *Apprendi* would permit a legislature to employ structured sentencing only if it committed the structured decisional process to a jury. It would forbid the legislature curtailing, in any way, the sentencing discretion of a trial court. In essence, it would force a legislature to choose one of three sentencing processes. First, the legislature could eliminate sentencing discretion altogether by assigning a fixed sentence for each crime, as was common in the late eighteenth century.[37] Second, the legislature could set a range of punishment for each crime and leave the exact sentence to the unbridled discretion of the trial court, as became common in the nineteenth century.[38] Third, the legislature could enact sentencing guidelines, like Washington's SRA, and have a jury make all the mandated findings. What it could *not* do is have a judge apply the guidelines.

Legislatures have historically delegated sentencing authority to both judges and juries, in an attempt to

---

[37] *Apprendi*, 530 U.S. at 479 ("[W]ith respect to the criminal law of felonious conduct, the English trial judge of the later eighteenth century had very little explicit discretion in sentencing. The substantive criminal law tended to be sanction-specific; it proscribed a particular sentence for each offense.") (citation omitted).

[38] *Id.* at 481 (affirming the Court's previous "recognition of judges' broad discretion in sentencing – since the 19th-century shift in this country from statutes providing fixed-term sentences to those providing judges discretion within a permissible range ....").

exploit the relative advantages of both. Judges enhance rationality through their legal training, professional discipline, and institutional knowledge. Juries protect liberty by preventing consolidation of decision-making power in a single person and by supplying a cross-section of the conscience of the community. A legislature thus may wish to delegate certain sentencing decisions to the judge and others to the jury, and there is no clear reason why the Fifth and Sixth Amendments should impede this thoughtful division of responsibility. *Apprendi* requires juries to set the upper limit of a convict's sentence, so as to prevent erosion of the essential liberty in the Fifth and Sixth Amendments, but it should not prevent legislatures from designing sentencing processes that blend the aptitudes of judge and jury.

In this case, for instance, the Washington legislature may understandably prefer to have the trial judge make the finding of a "substantial and compelling" reason for upward departure, because the trial judge will be constrained by memory of past cases and by the repeated discipline of appellate review. Blakely's interpretation of *Apprendi* would prevent the Washington legislature from choosing this option. If the Washington legislature still wished to provide for upward departure and did not want to entrust this decision to a jury, it would have to widen the standard sentencing range that results from tabulation of the offense seriousness level and the offender score (perhaps from 49-53 months to 49-120 months) and then leave it to the unfettered discretion of the trial court to impose a sentence anywhere within the significantly wider range. This approach would all but eliminate the transparency and regularity that the legislature sought to gain by prescribing guidelines in the first place.

The bottom line is that Blakely's interpretation of *Apprendi* would cut a wide swath through the various blended sentencing regimes that state legislatures have developed over the years. Several States — e.g., Michigan, [39] Minnesota, [40] North Carolina, [41] and

---

[39] The Michigan guidelines provide that "[a] court may depart from the appropriate sentence range established under the sentencing guidelines ... if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." Mich. Comp. Laws Ann. § 769.34(3). Rather than providing a non-exhaustive list of "aggravating" factors like Washington, however, the Michigan guidelines set forth a number of factors that may not be considered for such a purpose. Mich. Comp. Laws Ann. § 769.34(3)(a),(b) .

[40] Under Minnesota's guidelines, "in each case in which the court imposes or stays a sentence that deviates from the sentencing guidelines," the "court shall make written findings of fact as to the reasons for departure ...." Minn. Stat. Ann § 244.10, subd. 2. Any departure must be supported by "substantial compelling reasons." *State v. Givens*, 544 N.W.2d 774, 776 (Minn. 1996). Like that of Washington, "[t]he commission [in Minnesota] has produced a nonexclusive list of appropriate aggravating and mitigating factors to assist a trial court considering departure in its analysis." *Id.*

[41] In North Carolina, the trial court "may depart from the presumptive range" if it "finds that aggravating or mitigating factors exist." N.C. Gen. Stat. § 15A-1340.16(b). "The court shall make [written] findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range ...." N.C. Gen. Stat. 15A-1340.16(c). The statute provides a list of "aggravating factors," but also allows the judge to find "[a]ny other aggravating factor reasonably related to the purposes of sentencing." N.C. Gen. Stat. § 15A-1340.16(d)(20).

Oregon [42] — have sentencing regimes that are functionally identical to Washington's. They would almost certainly be invalidated under Blakely's interpretation of *Apprendi*. Two States — Arkansas[43] and Florida[44] — permit upward departure but do not require a stated reason unless the departure exceeds a certain percentage of the "standard" sentence.

The Arkansas and Florida guidelines emphasize the irrational effect of the rule proposed by Blakely. In

---

[42] "Under [Oregon's] guidelines, a sentencing judge may impose a sentence that is an upward or downward departure from the presumptive sentence for a crime on finding 'substantial and compelling reasons' that justify imposing such a departure." *State v. Dilts*, 2003 WL 22966264, at *2 (Or. Dec. 18, 2003), *citing* Or. Admin. R. 213-008-0001. "The rules provide a list of aggravating and mitigating factors that a sentencing judge may consider in determining whether substantial and compelling reasons exist to impose a departure sentence." *Dilts*, at *2, *citing* Or. Admin. R. 213-008-0002.

[43] In Arkansas, "the trial court may deviate within a five percent (5%) range below or above the presumptive sentence without providing a written justification." Ark. Code Ann. § 16-90-804(a)(1). If the trial court departs more than the designated 5%, however, he or she must provide "written justification." Ark. Code Ann. § 16-90-804(a)(2)(A). Like the system at issue here, moreover, the Arkansas guidelines provide "a nonexclusive list of factors which may be used as reasons for departure ...." Ark. Code Ann § 16-90-804(d).

[44] Under Florida's system, "[a] trial court judge may impose a state prison sentence which varies upward or downward by up to, and including, 25 percent from the recommended guidelines state prison sentence without issuing a written statement delineating the reasons for the variation." Fla. Stat. ch. 921.0016(1)(b). A "sentence which varies upward or downward from the recommended guidelines ... by more than 25 percent is a departure sentence and must be accompanied by a written statement delineating the reasons for the departure ...." Fla. Stat. ch. 921.0016(1)(c). Like Washington, the Florida guidelines include a non-exhaustive list of "[a]ggravating circumstances under which a departure ... is reasonably justified." Fla. Stat. Ch 921.0016(3).

both States, the trial court may depart from the "recommended" or "presumptive" range up to a set percentage without offering any justification for the departure. In other words, it may do so for numerous unstated reasons or for no articulable reason at all. This is perfectly permissible under Blakely's interpretation of *Apprendi*. Once the guidelines require the court to provide justification, however (i.e., on an upward departure of more than 5% in Arkansas and more than 25% in Florida) they violate the Sixth Amendment. Thus, perversely, the Sixth Amendment is violated by a requirement that provides substantially more protection to a defendant.

III. It Makes No Sense To Treat Even Soft Findings — Such as Whether There Is a "Substantial and Compelling" Reason To Depart Upward From the Standard Sentence — as Elements of the Crime That Must Be Found by the Jury.

Finally, Blakely's interpretation of *Apprendi* would treat as "elements" of the crime certain soft findings that are not truly findings of fact but instead reflect the application of law and judgment to a field of facts. This sort of finding — such as whether there is a "substantial and compelling" reason to depart upward from the standard sentence — is not aptly characterized as "the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." [45] It is more like a judgment — a legal conclusion that requires consideration of a wide array of facts and is not reducible to a formula or to the

---

[45] *Apprendi*, 530 U.S. at 483.

discovery of a discrete datum. It is the declaration of the legal significance of fact, not the finding of fact itself. It does not comfortably fit within the rule of *Apprendi*.

In capital cases, a great number of States, including Washington and Alabama,[46] require the sentencer to weigh aggravating and mitigating circumstances to determine whether the defendant deserves the death penalty. Under Blakely's interpretation of *Apprendi*, the question whether the aggravating circumstances outweigh the mitigating circumstances would become an element of the crime of capital murder and would have to be proved to a jury beyond a reasonable doubt. But that makes no sense:

> While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard, the relative weight is not. The process of weighing circumstances is a

[46] Alabama (Ala. Code § 13A-5-46); Arkansas (Ark. Code Ann. § 5-4-603 (Repl. 1997)); California (Cal. Penal Code § 190.3 (West 1999)); Connecticut (Conn. Gen. Stat. § 53a-46a (2001)); Kansas (Kan. Stat. § 21-4624 (1995)); Maryland (2002 Md. Laws 26); Mississippi (Miss. Code Ann. § 99-19-101 (1999)); Missouri (Mo. Rev. Stat. § 565.030, 565.032, 565.035 (West 1999)); Nevada (Nev. Rev. Stat. 175.552, 175.554, 175.556 (1995)); New Hampshire (N.H. Rev. Stat. Ann. § 630:5 (1996)); New Jersey (N.J. Stat. Ann. § 2C:11-3 (West 1995)); New Mexico (N.M. Stat. Ann. § 31-20A-2 (1978)); New York (N.Y. Crim. Pro. Laws § 400.27(11)(a) (McKinney 1995)); North Carolina (N.C. Gen. Stat. § 15A-2000(b) (1995)); Ohio (Ohio Rev. Code Ann. § 2929.03(D)(2) (West 1996)); Oklahoma (Okla. Stat. Ann. Tit. 21 § 701.11 (West 1983)); Pennsylvania (42 Pa. Consol. Stat. § 9711(c)(1) (West 1998)); Tennessee (Tenn. Code Ann. § 39-13-204(g)(1) (1989)); Utah (Utah Code Ann. § 76-3-207(b) (1953)); and Washington (Wash. Rev. Code Ann. § 10.95.060(3) (2002), *see also State v. Brown*, 940 P.2d 546 (Wash. 1997).

> matter for judge and jury, and, unlike facts, is not susceptible to proof by either party.[47]

This is particularly true given this Court's holding that the sentencer must be permitted to consider every possible piece of mitigating evidence during the process of weighing.[48] Indeed, this Court held that the sentencer must be given "unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty."[49] A finding that requires the exercise of "unbridled discretion" cannot logically be considered an element of the crime under the Fifth and Sixth Amendments.

To treat these soft findings as elements of the crime would also be impractical. It would turn federal indictments, at least,[50] into lengthy, almost limitless disquisitions on the various prejudicial details of the crime. Had this case been federal, for instance, the government would, in Blakely's view, have been required to detail Blakely's use of the coffin-like box to transport his wife from Washington to Montana, his threats against her in the presence of his son, and any other circumstance that might be relevant to the sentencing jury's later determination whether there is "substantial and compelling" reason to depart upward

[47] *Ford v. Strickland*, 696 F.2d 804, 818 (11th Cir. 1983) (internal citations omitted); *Foster v. Strickland*, 707 F.2d 1339, 1345 (11th Cir. 1983).

[48] *Lockett v. Ohio*, 438 U.S. 586, 606 (1978); *accord Zant v. Stephens*, 462 U.S. 862, 878-79 (1983); *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982).

[49] *Zant v. Stephens*, 462 U.S. at 875.

[50] The Fifth Amendment Grand Jury Clause has not been incorporated into the Fourteenth Amendment Due Process Clause. *Hurtado v. California*, 110 U.S. 516 (1884); *Beck v. Washington*, 369 U.S. 541, 545 (1962).

from the standard sentencing range for the crime. Like the rest of Blakely's arguments, it is far from clear that such a requirement would inure to the benefit of criminal defendants.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Washington Court of Appeals.

Respectfully submitted,

William H. Pryor Jr.
Attorney General

Kevin C. Newsom
Solicitor General

Michael B. Billingsley
Deputy Solicitor General
Counsel of Record *

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130-0152
(334) 353-3915, 242-7495 *

Of Counsel

Nathan A. Forrester
BRADLEY ARANT ROSE & WHITE LLP
One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203-2104
(205) 521-8604

(Additional counsel for amici curiae are listed inside the front cover.)

January 23, 2004